PRINCIPLES AND PRECEDENTS

OF

Moohummudan Law,

BEING

A COMPILATION OF PRIMARY RULES
RELATIVE TO THE DOCTRINE OF INHERITANCE
(INCLUDING THE TENETS OF THE *SCHIA* SECTARIES),
CONTRACTS AND MISCELLANEOUS SUBJECTS;

AND

A Selection of Legal Opinions involving those points, delivered in the several Courts of Judicature subordinate to the Presidency of Fort William;

TOGETHER WITH

NOTES ILLUSTRATIVE AND EXPLANATORY,

AND

Preliminary Remarks.

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PRELIMINARY REMARKS.

THE want of some practical information on the subject of Moohummudan Law has long been felt and acknowledged by those whose duty it is to decide matters of civil controversy agreeably to its principles. The translation of the *Hidaya*, indeed, is calculated to extend a general knowledge of that Code, but it is of little utility as a work of reference, to indicate the Law on any particular point which may be submitted to judicial decision. Questions which are likely to be litigated give place to extravagant hypotheses, the occurrence of real cases, similar to which, is beyond the verge of probability. The arrangement is immethodical; the most prolix and irrelevant discussions are introduced; every argument, however absurd, both for and against each particular tenet, is urged and combated (often with doubtful success); and the reader is frequently at a loss to determine which opinion to adopt and which to reject.

" No branch of Jurisprudence is more important than the Law of Successions or Inheritance; as it constitutes that part of any national system of laws which is the

most peculiar and distinct, and which is of most frequent use and extensive application."*

The subject unquestionably is of the greatest importance, as affecting the interests of all descriptions of people; but the *Hidaya* is entirely silent on the subject. It deserves special notice as giving rise to interminable litigation; a result attributable, more probably, to the almost universal ignorance of the people who are affected by it, than to any intricacy or obscurity of the Law itself. No English writer, that I am aware of, has treated of the Moohummudan Law of Inheritance excepting Sir William Jones, who translated the *Sirajyah*, a celebrated work on that subject; but, being a version of a scientific Arabic treatise, the style of his work is necessarily abstruse, so much so, that a knowledge of the original language is almost requisite to the study of the translation. In his abstract translation of its commentary (the *Shureefeca*) he has introduced such illustrations only as appeared to him (who was thoroughly acquainted with the text) necessary to facilitate the understanding of it. For these considerations I was induced to undertake the work which is now with diffidence submitted to the Public. Conscious of my inability to do justice to the task, I may yet venture to express a hope, that my labours may prove of some assistance to my judicial brethren, or that, at least, an abler individual may follow up with success the work which I have so imperfectly commenced. I am aware that, among other faults, I may be charged with being obscure, where I laboured at brevity, and with being tiresome, where my

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* Colebrooke's Preface to the two Treatises on the Hindoo Law of Inheritance.

object was illustration. I can only say, that I have endeavoured, as much as was in my power, to avoid technicalities, and to treat the subject with all the perspicuity of which it is susceptible. I have spared myself no pains in my researches to establish the accuracy of the legal doctrines here laid down, and to those who are disposed to view with approbation any attempt, however humble, at the promotion of justice, it may perhaps seem reasonable, that the disadvantages of the author should be weighed against his imperfections. Continual want of leisure and occasional privation of health have attended me during the progress of this work. I should mention, that the compilation is (excepting the assistance derived from learned natives) entirely and exclusively my own, and that it consequently possesses no official weight whatever, and no authority, beyond that which may be ascribed to it by individual confidence. The brief disquisition on the Moohummudan Law, which I have here ventured to introduce, may not be matter of much utility; but I was amused by the analogy occasionally observable between this and other Codes of Jurisprudence, and it appeared to me, that by recording such observations as my limited knowledge suggested, I might be the means of attracting the attention of others to the genius of the Law in question.

The provisions of the Moohummudan Law of inheritance have for their basis the following passages of the Koran; "God hath thus commanded you concerning your children. A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two third parts of what the deceased shall leave; and if there be but one, she shall have

the half: and the parents of the deceased shall have each of them a sixth part of what he shall leave if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part: and if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath and his debts be paid. *Ye know not whether your parents or your children be of greater use unto you.* This is an ordinance from God, and God is knowing and wise. Moreover ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and the debts be paid: they also shall have the fourth part of what ye shall leave in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath and your debts be paid: and if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate, but if there be more than this number, they shall be equal sharers in the third part, after payment of the legacies which shall be bequeathed and the debts, without prejudice to the heirs."* "They will consult thee for thy decision in certain cases: say unto them, God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue, and have a sister, she shall have the half of what he shall leave; and he shall be heir to her, in case she have no issue, but if there be two sisters, they shall have, between them, two third

* Sale's Koran, pages 94 and 95, vol. I.

parts of what he shall leave: and if there be several, both brothers and sisters, a male shall have as much as the portion of two females."* In these provisions we find ample attention paid to the interests of all those whom nature places in the first rank of our affections; and indeed it is difficult to conceive any system containing rules more strictly just and equitable. The obvious principle of preferring the nearer kindred to claimants whose relation to the deceased is not so proximate, seems to have been adopted as the invariable standard for fixing the proportions; and the rules for the succession of the several heirs, and the order of preference assigned to the different degrees of consanguinity, seem to be exactly what would be most consonant to the general inclination of mankind. The Mosaic Law on the subject of Inheritance is more brief and less comprehensive: "And thou shalt speak unto the children of Israel, saying, if a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter; and if he have no daughter, then ye shall give his inheritance unto his brethren. And if he have no brethren, then ye shall give his inheritance unto his father's brethren: and if his father have no brethren, then shall ye give his inheritance unto his kinsman that is next to him of his family, and he shall possess it."† Here we find no provision whatever made for the parents, although there are certainly other obvious reasons besides that adduced in the emphatic language of the Koran, why they should not be excluded. "Upon failure of issue in the first and the other descending degrees, reason sug-

* Sale's Koran, page 127. † Numbers, chap. 27.

gested that inheritance ought to turn back into the line of ascendants; as well in consideration that, for the most part, either the possessions themselves, or at least the first seeds and principles of them, which the children afterwards increased, proceed from the parents, as because their extraordinary benefits give them an especial title to this reward: who, since they would much rather have desired, *that their children should inherit their fortunes*, yet when they survived them, contrary to the course of nature, it was but equitable they should receive (however melancholy) this comfort of succeeding to what the children possessed. *It is a condition* (as Pliny observes) *abundantly unhappy for a father to be sole heir of his own son.*"*

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* Puffendorf on the Law of Nature and Nations, book IV, chap. ix, § 13, and see continuation of the argument. The same learned author cites the following argument, as having been adduced to prove that the rights of the parents were not overlooked by the Jewish Law; but he does not seem to attach much weight thereto, and it is sufficient, for my purpose, that the Law in question contains no express provision for the parents. In truth, the argument advanced seems rather jesuitical: "Philo the Jew reporting that Moses established this order of inheritance, that the sons should stand first, the daughters next, then the brothers, and in the fourth place the uncles by the father's side, used this as an argument to prove that fathers likewise may inherit what their sons leave behind; for it would be useless (says he) to imagine that the uncle should be allowed to succeed his brother's son, as a near kinsman to the father, and yet the father himself be abridged of that privilege; but inasmuch as the law of nature appoints that children should be heirs to their parents, and not parents to their children, Moses passed this case over in silence, as ominous and unlucky, and contrary to all pious wishes and desires; lest the father and mother should seem to be gainers by the immature death of their children, who ought to be afflicted with most inexpressible grief. Yet by allowing the right of inheritance to the uncles, he obliquely admits the claim of the parents, both for the preservation of decency and order, and for continuing the estate in the same family."

Accordingly we find that the Civil Law expressly enumerates the parents among heirs.

In the English Law of successions to the personal property of intestates, I am aware that ample consideration is shown to the parents; but they are excluded from inheriting real property.

The Hindoo Law makes provision for the parents, but its rules differ generally from those of the Moohummudan Code, inasmuch as, agreeably to the former, several descriptions of heirs, varying in degree of relation, inherit successively, but not simultaneously. According to the Hindoo Law, where there are sons or other lineal male descendants, they alone are the legal heirs. I make no mention of the provision assigned to the mothers and to the daughters; that to the former persons being assigned, only in the case of partition by sons, and that to the latter persons being accorded rather with a view to their maintenance than admitted as an absolute and indefeasible right of inheritance. According to the Moohummudan Law, on the other hand, the claim of the daughters to a share equal to half of what is taken by the sons is recognized as being on the same footing as the claim of the sons; and so also the claim of the father and mother, and husband and wife, to their specific allotments. The parents are entitled to the inheritance, by the Hindoo Law, only in default of male or female issue of the widow, and, conformably to some authorities, of the brothers also.*

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* In this respect the Civil Law seems to partake of the principles both of the Hindoo and Moohummudan Codes. It resembles the former in giving exclusive preference to the children, and it resembles the latter in permitting simultaneous succession of brethren and parents.

The apparently unjust preference of the elder son, to the exclusion of all the rest, which in our own Law had its origin in the feudal policy of the times, is rejected by the Moohummudan Law, and the equitable principle of equality obtains in its stead. The learned author of the Commentaries on the Law of England informs us, that "the Greeks, the Romans, the Britons, the Saxons, and even originally the Feudists, divided the lands equally."* He admits that this is certainly the most obvious and natural way, and quaintly observes, that "it has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice."† That there are reasons of expediency which suggest this preference there can be no doubt; but how far it may be consistent with justice may perhaps be questionable. It is by this principle of equality also that the Hindoo Law of successions is governed.‡

The only rule which bears on the face of it any appearance of hardship, is that by which the right of representation is taken away, and which declares that a son, whose father is dead, shall not inherit the estate of his grandfather together with his uncles. It certainly seems to be a harsh rule, and is at variance with the English, the Roman, and the Hindoo Laws.§ The Moohummudan

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* Blackst. Com. vol. 2, page 214.

† Ibid.

‡ Conformably to the ancient Hindoo Law, the right of primogeniture was partially recognized, "let the eldest have a double share, and the next born a share and a half, if they clearly surpass the rest in virtue and learning." Menu, chap. ix. § 117, but the distinction in favour of primogeniture is abolished in the present age.

§ According to the Scottish Law, I find that although the right of representation is acknowledged as to real property, yet that it does not

doctors assign as a reason for denying the right of representation, that a person has not even an inchoate right to the property of his ancestor, until the death of such ancestor, and that, consequently, there can be no claim through a deceased person, in whom no right could by possibility have been vested.

I have met with a passage in a learned author already quoted, which seems so apposite to the present subject, that I may be pardoned for transcribing it here: "On the proposition which we before advanced, *That parents are obliged to afford sustenance to their children, not only of the first, but of farther degrees, in case their proper parents, who ought to perform this office, are extinct*, is chiefly founded the *equity* of that *right* termed *the right of representation;* by virtue of which, children are supposed to fill the place of their deceased father, so as to be allowed the same share in the family inheritance as their father, were he now living, would receive; and, consequently, to succeed on the level with those who stand in their father's degree. And it would indeed be a lamentable misfortune, if, besides the untimely loss of their father, they would farther be deprived of those *possessions* which either the rule of the Law, or the design of their *progenitors*, had given their *parents* just hopes of enjoying. But if in any place the *civil constitutions* will not admit of this *representative right*, the children, who have been so unhappily bereaved of their father and of their hopes, must endeavour to bear the calamity as an affliction which Providence hath laid upon them."*

obtain in the succession of moveables, except in the single case of a competition between the full blood and half blood.—Erskine's Principles, page 414.

* Puffendorf on the Law of Nature and Nations.—Book IV, ch. xi, §§ 12.

The rules of inheritance prescribed by this Code differ from those of any other with which I'am acquainted. It would be a useless task to point out its peculiarities, as they are obvious. Perhaps the system to which it bears the nearest resemblance, is that of our own Law in distributing the personal property of an intestate, according to which, "when relations are found who are distant from the intestate by an equal number of degrees they will share the personal property equally, although they are relations to the intestate of very different denominations, and perhaps not relations to each other. As if the next of kin of the intestate are great uncles or aunts, first cousins, and great nephews or nieces, these being all related to the intestate in the fourth degree, will all be admitted to an equal distributive share of his personal property."* But to this system even the resemblance must be admitted to be very faint.†

* Blackst. Comm. vol. II, page 515, Note.

† There is a remarkable degree of similarity between the provisions of the English Law relative to the mode of disposing of an intestate's personal estate and the rules of the Moohummudan Law for administering to the property of a person deceased. In the Commentaries, treating of the duty of an executor or administrator, it is enjoined, "He must bury the deceased in a manner suitable to the estate which he leaves behind him, necessary funeral expences are allowed previous to all other debts and charges." The *Sirajyah*, treating of the successive duties to be performed with regard to the property of a person deceased, commences, "first his funeral ceremony and burial without superfluity of expence, yet without deficiency." The commentaries, "the executor or administrator must pay the debts of the deceased." The *Sirajyah*, "then the discharge of his just debts from the whole of his remaining effects." Again, the Commentaries, "when the debts are discharged, the legacies claim the next regard." And the *Sirajyah*, "then the payment of his legacies out of a third of what remains." Lastly, the Commentaries,

The Moohummudan lawyers have divided heirs* into three different classes, first, legal sharers; secondly, residuaries, and those are either by relation or by special cause; and thirdly, distant kindred. The legal sharers are the husband and wife, the father and mother, the grandfather and grandmother, the brother by the same mother, the sister by the same mother, the uterine sister, the sister by the same father, the daughter, and the son's daughter. The residuaries by relation are the sons and their descendants, the father and his descendants, the paternal grandfather in any stage of ascent and his descendants, and in some cases sisters and daughters. Those by special cause are the manumittors of slaves and their heirs. The distant kindred comprise all those relations who are neither legal sharers nor residuaries; and, in their default, the property goes to the successor by contract, and to persons of acknowledged, though not proved, consanguinity. It will be seen, on reference to the principles of inheritance, that many of the persons above enumerated have the privilege of simultaneous succession, whether the property be real or personal; which circumstance is the chief peculiarity of the Moohummudan Code.

The rules agreeably to which distributions are made would, at first sight, appear rather complex and intricate; but they may be speedily acquired by a very moderate

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"when all the debts and particular legacies are discharged, the surplus or residuum must be paid (where it is not left to the executor) to the next of kin: and the *Sirajyah*, "and lastly, the distribution of the residue among his successors."

* Throughout this work I use the term "*Heir*" in its broadest sense, to signify any person who has a right of inheriting any species of property.

share of attention, and, when once known, there can arise no legal problem, relative to successions, which would not, by their means, admit of easy and satisfactory solution. It must, at the same time, be admitted, that the heterodox Code, or that which is observed by the *Schias* (commonly called the *Imameeya* sect, as they follow the doctrines of the twelve *Imams*) can boast of much greater simplicity. This Code has hitherto had no weight in India, and even at *Lucknow*, the seat of heterodox majesty itself, the tenets of the *Soonees* are adhered to. I have however given a compendium of their law of inheritance, extracted from the "*Shuraya ool Islam*," a work of the highest authority among them. This I was induced to do, as no account has ever been rendered, to my knowledge, of the doctrine of the sect in question, on the law of inheritance; and as I have reason to believe that our courts of justice have passed decisions avowedly in conformity to its principles. Considering the universal toleration that prevails throughout the British dominions in India, it is perhaps but equitable, that the Law should be administered to the sectaries in question, agreeably to their own notions of jurisprudence, especially in matters affecting the succession to property, in which cases both parties are of course always of the same persuasion.

Where the Law expressly prohibits the receipt of interest on money, and all usurious contracts, it is natural to find the provisions regarding purchase, sale, and similar transactions, extremely simple and certain in their nature. Such is accordingly the case in the Moohummudan Law. There is no distinction made between sale and permutation; a barter of one commodity for another

being designated a sale. Even according to our own Law, the distinction is merely nominal, and there is no difference as to the legal provisions relative to sales and exchanges. The principal points of difference seem to be, the absence of any discrimination in the Moohummudan Law of sales of real and personal property, and its recognizing verbal contracts as of equal validity with written ones. Another essential point of difference is, that the maxim of *caveat emptor* finds no place in this code.

The most efficient safeguards against the effects of improvidence in purchasers are established, so much so, as almost to exclude the possibility of circumvention. A warranty is implied in every sale and a reasonable period of option may be stipulated, during which it is lawful to annul the contract. Where property has been purchased unseen it may be returned, if it does not fully answer the description, and the seller may at any time be compelled to receive back the property and refund the purchase money, on the discovery of a blemish or defect, the existence of which, when in the possession of the seller, may be susceptible of proof.

In exchange, where the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition to the validity of the contract, and no term of credit, on either side, is admissible, which would be advantageous to one of the parties, and savour therefore of usury; but where goods are sold for money, or money is advanced for goods, a term may be stipulated for the payment of the money, or for the delivery of the goods. So tenacious however is the Law, of certainty, that it will not admit of any, the least,

indefiniteness in the term. The date must be specified. From the above observations it will be seen, that the Moohummudan Law of sales does not differ very materially from the Civil Law, to which the provisions of the Scottish code bear a close resemblance.*

Sales of land and other immoveable property are clogged with an incumbrance, which is not, however, peculiar to this code. I allude to the Law of pre-emption. This confers the privilege on a partner or neighbour to preclude any stranger from coming in as a purchaser, provided the same price be offered as that which the vendor has declared himself willing to receive for the property to be disposed of.

In the Jewish Law† allusion is made to the custom, but it is not to be found among the ordinances of the Koran. On the authority of *Puffendorf* it would appear that the right in question was not unknown to the ancients. He states "another more easy sort of redemption, is what they call *Jus* προτιμήσεως, or the privilege of the first refusal, that is, if the buyer be hereafter disposed to part with the commodity, he must let the

* The vendor, where he is not the true owner, cannot, by delivery, transfer to the purchaser the property which was not his to give; but the purchaser, in respect of his *bonâ fide*, makes the fruits of the subject his own, till it be evicted, or at least reclaimed, by the true owner, 2. 1. 14. And, as warrandice is implied in all sales, the vendor must make the subject good, if it be evicted, 2. 3. 11. The insufficiency of the goods sold, if it be such as would have hindered the purchaser from buying had he known it, and if he quarrels it recently, founds him in an action, (*Actio redhibitoria*) for annulling the contract. If the defect was not essential, he was, by the Roman Law, entitled to a proportional abatement of the price, by the action *quanti minoris*.—Erskine's Principles: page 310.

† Leviticus, chap. xxv.

seller have the first refusal at the same rate he would sell it to another. In many cases, certain persons pretend to this privilege by Law, as the landlord in the sale of his tenant's stock, the creditor in his debtor's goods, the neighbour in the purchase of a neighbouring farm, any members in a thing that belongs to the society, and the next of kin in the goods of their relations, which is peculiarly called *retractus gentilitius*, or the family privilege."* For a long time, I was of opinion that the municipal Law of the Hindoos had no provision to justify the claim of such a privilege; and, indeed, the more current authorities are entirely silent on the subject. Hindoo litigants, of course, have endeavoured to assume it whenever self-interest dictated; but I was not, until lately, aware that any authority could be cited in its support. By the Moohummudan Law, unquestionably, Hindoos have the same title to claim the privilege as Moosulmauns; but, assuming it to form no part of their own Law, I apprehend they ought not to be permitted to take advantage of the doctrine in question. The principles of the Hindoo and Moosulmaun Codes are declared applicable to cases of inheritance, contract, &c. arising among these two great bodies of the community; but, at the same time, applicable respectively only. It is declared, also, that where the parties are of different persuasions, the Law of the defendant shall be adhered to, but by this provision, it was never intended that a plaintiff might make his election between the two Codes, and prefer a claim to be decided by that Law which best suited his particular purpose.—While officiating, as judge of the *Zillah*

* Book V, chap. v, §§ 4.

Court of *Shahabad* I made a reference to the *Sudder Dewanee Adawlut* on a point connected with this question, to the following effect: "does the Moohummudan Law of *Shoofaa*, or right of pre-emption extend to Hindoos? or in other words, would the Court be justified in entertaining and investigating a claim preferred by one Hindoo against another, and resting solely and avowedly on the principle of Law above-mentioned? I am supposing the defendant either to have demurred on the plea of the inapplicability of the Law quoted to his case, or from ignorance, or from thinking that he had other substantial grounds of defence, or from any other cause, to have neglected making the objection; but at the same time not to have expressly admitted his willingness to leave the point at issue to be tried according to the provisions of that Law. I can find only one case (the first) among the printed reports at all bearing on the point: there is a remark subjoined which seems by no means satisfactory or conclusive: the case is clearly not included in the Letter of Section XV, Regulation VI, 1793, nor in any subsequent enactment; but I observe in Mr. Harington's analysis, that on a reference to the *Sudder Dewanee Adawlut* in the year 1[illegible]8, the Court were of opinion that the spirit of the rule for observing the Hindoo and Moohummudan Laws was applicable to cases of slavery, though not included in the letter of it. The same principle of construction might I think be extended to this case: I conceive that a Moohummudan, with as much reason, might sue his brother for the *Jethansha*,* or larger share in right of primogeni-

* This right is obsolete in the *Cali* or present age among the Hindoos, but as it still retains a place in their law books, and is a characteristic

ture, according to the Hindoo Law. In the *Hidaya* the right of *Shoofaa* is declared to be but a feeble right, as it is the disseizing another of his property, merely in order to prevent apprehended inconvenience: its extension to all cases of neighbourhood cannot fail to depreciate the value of landed property; and being impressed with a conviction of the unreasonableness of the Law in question, according to modern construction, I should feel very much inclined to circumscribe its operation within as narrow bounds as possible. The suits which occasioned the present reference are seven in number. The parties, at least the *Shafee* or claimant of the right, and the seller or defendant, are the same individuals in all the seven suits. These two persons purchased at public auction, four or five years ago, several very valuable estates, totally distinct from each other, with separated and defined boundaries. One of them having lately disposed of some of his *Mouzas*, by private sale, the other (who resides at Benares) sues him and the purchasers jointly, on his alledged right of pre-emption; the property of the claimant bordering on that sold. In four of the cases the defendant pleaded his own cause, and no demurrer was made on the plea of the inapplicability of the Law to the parties. In the other three, vakeels were entertained, and the objection was made. Under such circumstances, it can hardly be contended, that the omission in the pleadings implied that the defendant considered himself amenable to the Law in question; and I felt disposed, therefore, to non-

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feature of their Code, it served for the purpose of illustration on this occasion.

suit the plaintiff. I should have done so, had I not reason to believe that cases have been tried and decided on the merits under similar circumstances, and that an express authoritative opinion on the subject would effectually remove all doubt, and, by preventing one cause of unreasonable litigation, prove essentially beneficial to the community at large." To the above reference I was informed, in reply, that no rule of Moohummudan Law could apply to a civil suit in which the parties are Hindoos, as they would appear to be in the cases to which my query related; that the Court did not hold the 15th Section of Regulation IV, 1793, to preclude me from ascertaining from my Hindoo law officer whether the right of pre-emption was recognized by the *Hindoo Law*, and if so, what the provisions of the Law respecting it were; and that, at the same time, it was obvious, that it was not one of those cases in which the Regulations necessitate the Judge to follow the Law as expounded by his Law Officer, should it appear to be irreconcileable with well established local usage, or to be otherwise mischievous or manifestly inconvenient." Since, however, I had occasion to make this reference, I have found in the *Muha Nirbana Tuntra*, a work which chiefly treats of mythology, a passage which would seem to imply that pre-emption is recognized as a legal provision according to the notions of the Hindoos. For the gratification of the curious I subjoin in a note* the passage, with a

*स्थावरंधनमन्यस्मैस्थितेसान्निध्यवर्त्तिनियोग्येक्रेतरि विक्रेतुंनशक्तःस्थावराधिपः ११ सान्निध्यवर्त्तिनांज्ञातिः सवर्णोवाबिभिष्यतेतयोरभावेसुहृदोविक्रेत्रिच्छागरीयसी

translation. But it remains yet to be decided whether

। २ । निर्णीतमूल्येप्यन्येनस्थावरस्यक्रयोधर्मेतन्मूल्यंचे
त्समीपस्थोरातिक्रेतानचापरः । ३ । मूल्यंदातुमशक्तश्चेत्स
म्मतोविक्रयेपिवासन्निधिस्थस्तदन्यस्मैगृहीशक्नोतिवि
क्रये । ४ । क्रीतंचेत्स्थावरंदेविपरोक्षेप्रतिवासिनःश्रवणादे
वतन्मूल्यंदत्वासौप्राप्तुमर्हति । ५ । क्रेतातत्रगृहारामान्वि
निर्म्मायभुनक्तिचन्मूल्यंदत्वापिनाप्नोतिस्थावरंसन्निधि
स्थितः । ६ । करहीनाप्रतिहतावन्यावन्यातिदुर्गमाअना
दिष्टोपितांभूमिंसंपन्नांकर्त्तुमर्हति । ७ । बहुप्रयाससाध्या
यास्तस्याभूमेर्म्महीभृतेदत्वादशांशंभुंजीयात्तभूमिस्वामीय
तोनृपः । ८ । वापीकूपतडागानांखननंवृक्षरोपणंभूपरा
निष्टकरेदेशेनगृहीकर्त्तुमर्हति । ९ ।

The proprietor of immoveable property, having a neighbour competent to purchase it, is not at liberty to sell such property to another. Among neighbours, he who is a relation, or of the same tribe, is preferred. In their default a friend. [Here] the will of the seller prevails; even though the price of the immoveable property be agreed upon with another, yet if a neighbour [pay] the price, he is the purchaser, and not another. If the neighbour be unable to pay the price, or be consenting to the sale, the proprietor is then at liberty to sell it to another. O goddess! if immoveable property be sold in the absence of the neighbour, and he (the neighbour) pay the price immediately on hearing of the sale, he is competent to take it. But should the purchaser, having made houses or gardens, be in the enjoyment of them, the neighbour is not entitled to take such immoveable property even by paying the price. A person is at liberty, without permission, to cultivate lands which pay no revenue, or have been usurped, or waste, or, though not waste, are extremely difficult of access. He may enjoy the rest, having given to the king the tenth [of the produce] of the lands thus with difficulty acquired; the king being lord of the soil. A proprietor is not at liberty to dig ponds, wells, or pools, in a place where it would be annoying to others.

this shall be held to be practical Law or no.* The Pundit with whom I perused the passage in question, declared that the right of pre-emption takes effect only in cases where positive injury would result to the neighbour by the sale to a stranger; and, from the tenor of the last sentence, such would, indeed, seem to be the effect against which the provision was intended to guard.

It is true that there are numerous devices by which a claim, founded on the right of pre-emption, may be avoided, and that the Law itself, admitting its weakness, has annexed hard conditions to the establishment of its validity. But these are not sufficient bars to litigation in India, when opposed to the natural propensities of the natives, and the trifling expence at which they may purchase the gratification of inflicting legal annoyance.

The Law is extremely favourable to the donor where property is gratuitously conveyed. A gift should always be accompanied by delivery of possession. False pretences, legal incapacity, or other similar circumstances, under which the validity of a gift may be questioned, and which would render it either void *ab initio*, or voidable, need not be specified: they are the same as those which obtain in most other codes of jurisprudence, and they would no doubt avail in case of a suit brought by any representative of the donor to set aside a gift unduly made. But as to the donor himself, he has power to demand res-

* The interminable and troubled ocean of Hindoo jurisprudence is sure to present something for the support of any opinion which it may be desirous to keep afloat, for the purpose of temporary convenience; and were the expounders of this Code restricted in their citations to a few works of notorious authority, it might have a salutary effect in curbing their fancy, if not their cupidity.

toration, even where the gift may not have been attended by any disqualifying circumstances. This power, however, of revoking gifts, is subject to certain limitations. According to the English Law, a gift is revocable only under circumstances which would equally have operated to avoid any species of contract.* According to the Civil Law there were three causes only which could justify the revocation of a gift.† But, according to the Moohummudan Law, there are only seven circumstances under which a gift is not revocable.‡ A gift made on a death-bed, though not made in contemplation of death, is nevertheless not considered as a gift *inter vivos*, but has the effect of a legacy only, and consequently cannot extend to more than a third of the donor's estate. On comparing the chapter containing the principles of gifts (pages 50 to 52 of this work) with the contents of the subjoined note § taken from an authority already cited,

* Blackst. Com. vol. II, page 441.

† Browne's Civil Law, vol. I, page 229.

‡ See Prin. of Gifts, page 51, §§ 13, and Prec. of Gifts, page 224.

§ All donations, whether by the wife to the husband, or by the husband to the wife, are both by the Roman Law and ours, revocable by the donor: *ne conjuges mutuo amore se spolient*, l. 1, *de don. int. vir & ux.*; but if the donor dies without revocation, the right becomes absolute. A right may be revoked, not only by an explicit revocation, but tacitly, by afterwards conveying to another the subject of the donation, or by charging it with a burthen in favour of a third party; but in so far as the subject is not burthened, the donation subsists. Though the deed should be granted nominally, or in trust, to a third party, it is subject to revocation, if its genuine effect be to convey a gratuitous right from one of the spouses to the other; *plus enim valet quod agitur, quam quod simulate concipitur.*—Where the donation is not pure, it is not subject to revocation: Thus, a grant made by the husband, in consequence of the natural obligation that lies upon him to provide for his wife, is not revocable, unless in so far as it exceeds the measure of a

but little difference will be found to exist. It should here, however, be mentioned, that though gifts to relations are generally irrevocable, yet a gift from a father to his minor son is revocable at the pleasure of the former. The right of a husband to revoke a gift to his wife, and *vice versâ*, does not appear to be recognized, as it is in the Roman and Scottish Laws.

The disposition of a testator being legally restricted to one third of his estate, but little uncertainty can exist on the doctrine of wills and testaments. If the legacies exceed the amount above specified, the will is considered inofficious, and its provisions will be carried into effect *pro tanto* only. The law of Scotland also restricts a person, who leaves a widow and children, from disposing of more than a third part of his moveable property by will.* Nuncupative and written wills are of equal validity, and the same degree of evidence is required to prove them as is necessary to the establishment of any other ordinary transaction between man and man.

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rational settlement. Neither are remuneratory grants revocable, where mutual grants are made in consideration of each other, except where an onerous cause is simulated, and a donation truly intended.—Erskine's Principles, page 77.

* If a person deceased leaves a widow, but no child, his testament, or, in other words, the goods in communion, divide in two; one half goes to the widow, the other is the dead's part, i. e. the absolute property of the deceased, on which he can test, and which falls to his next of kin, if he dies intestate. Where he leaves children, one or more, but no widow, the children get one half as their legitim; the other half is the dead's part, which falls also to the children, if the father has not tested upon it. If he leaves both widow and children, the division is tripartite; the wife takes one third by herself; another falls, as legitim to the children, equally among them, or even to an only child, though he should succeed to the heritage; the remaining third is the dead's part.—Erskine's Principles, page 418.

The latitude granted by the permission of polygamy, and the apparent facility of divorce, are not, it must be admitted, accordant with the strict principles of impartial justice; but the evil, I believe, exists chiefly in theory, and but little inconvenience is found to follow it in practice. It is remarkable with what tenderness the rules relative to marriage and parentage are framed. Mr. Evans, in his Appendix to Pothier, treating of hearsay evidence, observes, "there is a disinclination to bastardize issue, which is sometimes perhaps carried too far. When parties are actually married, and there is no impossibility of the husband being the father of the issue of the wife, every consideration of decency and propriety repels the admission of evidence to the contrary; but when the question is, whether a person was or was not born during wedlock, it should be recollected that the interests of justice are concerned in preventing one, who is really a bastard, from usurping the rights of the legitimate members of the family; and there is no particular reason of public policy which requires that those who have the real rights in their favour should meet with peculiar obstacles in *substantiating the proof* of usurpation."* But the Moohummudan lawyers carry this disinclination much farther: they consider it a legitimate course of reasoning, to infer the existence of marriage from the proof of cohabitation.

None but children who are in the strictest sense of the word *spurious* are considered incapable of inheriting the estate of their putative fathers. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short,

* Vol. II, page 291.

where, by any possibility, a marriage may be presumed, the Law will rather do so than bastardize the issue; and, whether a marriage be simply voidable or void *ab initio*, the offspring of it will be deemed legitimate. Much misconception exists, I imagine, however, relative to the Moohummudan Law on the subject of legitimate and illegitimate issue, and it seems generally supposed that, agreeably to its provisions, no person can be considered a bastard. The learned Sale observes, that "among the Moohummudans the children of their concubines or slaves are esteemed as generally legitimate with those of their legal and ingenuous wives, none being accounted bastards except such only as are born of *common* women, and whose fathers are unknown." This, I apprehend, with all due deference, is carrying the doctrine to an extent unwarranted by Law, for where children are not born of women proved to be married to their fathers, or of females, slaves to their fathers, some kind of evidence (however slight) is requisite to form a presumption of matrimony. The mere fact of casual concubinage is not sufficient to establish legitimacy, and if there be proved to have existed any insurmountable obstacle to the marriage of their putative father with their mother, the children (though not born of *common* women) will be considered bastards to all intents and purposes. Another learned author also, citing the law of Solon, that a bastard shall not be deemed next of kin, nor any relation be supposed between him and the proper sons, proceeds to state, "on the contrary, amongst the Mahometans, as to the point of sharing the father's estate, there is no difference observed between the sons of the wife, the concubine, or the servant maid;" whereas, in point of fact, the

marriage of a free woman, proved or presumed, is the only ground for considering her issue legitimate.* It must be admitted, at the same time, that there is no more difficulty in establishing a marriage by the Moohummudan than by the Scottish Law, according to which, though no formal consent should appear, marriage is presumed from the cohabitation, or living together at bed and board of a man and woman who are generally reputed husband and wife.† Marriage also, according to this Code, is entirely a civil contract. In answer to the question as to whether it was necessary for a marriage to be celebrated by a *Kazee*, the law officers attached to the Provincial Court of Bareilly delivered an opinion, on the 19th of April 1823, suggesting the expediency of the observance of this form, rather than its necessity. They stated, for instance, that silence is an argument of consent, on the part of a woman, only when she is addressed by her near guardian or by the *Kazee*, of which point of Law illiterate persons might not be aware, and that where the bride does not appear in person, which is usual in this country, it is requisite that her agent should prove his commission to act on her behalf by witnesses, in the presence of a *Kazee*. One grand distinction between the Moohummudan Law and our own, and in which the former resembles the Civil Law, is that, according to it, the husband and wife are considered as distinct persons, who may have separate estates, contracts, debts, and injuries.‡

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* Puffendorf, book IV, chap. xi, §§ ix.

† Erskine's Principles, p. 67.

‡ Browne's Civil Law, vol. I, p. 37.

Their sentence of divorce is pronounced with as much facility as was repudiation among the Romans, in case of espousals. There is no occasion for any particular cause; mere whim is sufficient. I have already alluded to the small inconvenience which this facility produces in practice. Where conscientious and honourable feelings are insufficient to restrain a man from putting away his wife, without cause, the temporal impediments are by no means trifling. Dower is demandable on divorce, and, with a view to the prevention of such a contingency, it is usual to stipulate for a larger sum than can ever be in the power of the husband to pay.

The mode by which a wife is endowed, according to the Moohummudan Law, partakes partly of the nature of a jointure and partly of common dower, according to the Law of England. Where the estate which she is to take is specified, at the time of marriage, or subsequently thereto, it is a jointure to all intents and purposes, and the widow may enter upon it at once, without any formal process; but where no particular estate or amount in money may have been specified, she is entitled to her *Muhr misl* or proportionate dower, which, it must be admitted, is but ill defined, being so much as it may be found to have been usual, on an average estimate, to endow other females of the same family with. But, whatever the widow may gain in right of dower or jointure, she is not thereby precluded from coming in as one of the heirs, and claiming her indefeasible right of one-fourth, when her husband may have died childless, and of one-eighth, when he may have left children. It is a common practice (as was before observed) to stipulate for dower to an excessive amount, and as this claim

precedes that of inheritance, it might be inferred that the rights of children and other heirs are frequently defeated: but this is rarely the case. It seldom happens that a widow contracts a second marriage, and the property generally goes to the children of the original proprietor. There are weighty considerations in favour of the practice. Nothing seems so well calculated to preserve the peace, the property, and the character of families.

Guardians are of two descriptions, natural and testamentary: the natural guardians are the father and father's father, and the paternal relations generally, in proportion to their proximity to succeed to the estate of of the minor: the testamentary guardians are the executors of the father and grandfather. The father and grandfather are competent to the office of curator, as well as tutor, or, as they are expressed in the Bengal Code of Regulations, of manager as well as guardian; their executors (being strangers) can act as curators only, and the other paternal relations as tutors only. From this it would appear, that in providing for the care of minors, the Moohummudan Law partially agrees with the Roman, "committing the care of the minors to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate to which he has a prospect of succeeding, and this they term the *summa providentia*."* With a view, however, to afford some protection to the minor, the law requires that, until he be independent, or, according to the more approved doctrine, until he attain the age of seven years,

* Blackst. Com. vol. I, page 461.

he should remain in the custody of his mother, and in her default, in that of some other female relation; and indeed, in the *Hidaya,* in treating of this custody, some danger seems to be apprehended from trusting a minor with one who, though sufficiently near in point of relation to inherit the estate, is not near enough to entertain any very strong affection for his ward. It is stated in page 387, vol. 4, "If there be no woman to whom the right of *Hazânit* appertains, and the *men* of the family dispute it, in this case the nearest paternal relation has the preference, he being the one to whom the authority of guardian belongs: (the degrees of paternal relationship are treated of in their proper place) but it is to be observed, that the child must not be entrusted to any relation *beyond* the prohibited degrees, such as the *Mawla,* or emancipator of a slave, or the son of the paternal uncle, as in this there may be apprehension of treachery." This principle of entrusting the guardianship to an heir, has not wanted its advocates. Lord Macclesfield condemned the opposite rule, and declared it not to be grounded upon reason, but to have prevailed in barbarous times, before the nation was civilized.* Solon, it appears, was of the same opinion with the English lawyers; Lycurgus with the Roman.† The Regulations of Government, however have, (as far as the guardianship of the person is concerned) seemed to adopt the maxim of English Law, that "to commit the custody of an infant to him that is next in succession is *quasi agnum committere lupo ad devo-*

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* Blackst. Comm. Note to page 461, vol. I.
† Browne's Civil Law, Note to page 89, vol. I.

randum;"* and, consequently, they are distinctly precluded from the trust by Section II, Reg. I, of 1800, which declares, that "the guardianship is in no instance to be entrusted to the legal heir of the ward, or other person interested in outliving him." The good sense of the Law of Charondas is recognized, who separated the care of the person and estate, giving that of the latter to the next heir.† By Section VIII, Reg. X, of 1793, it was enacted, that, in the selection of a manager, preference should be given to the legal heirs of the estate; and although that rule has been rescinded, and it is now no longer obligatory to show such preference, where better managers may be procurable, yet the principle of the rule remains unchanged, and the legal heirs are still, at least equally eligible with other persons. The Regulations‡ of Government also, by defining the age at which persons shall be held to have attained majority, have precluded the occurrence of many disputes which might arise, were this circumstance to be judged of by the indefinite criterion of Moohummudan Law; a criterion more fallible even than that of the hability ‖ of the civilians. The rules relative to guardian and

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* Blackst. Comm. page 461, vol. I.

† Browne's Civil Law, Note to page 89, vol. I.

‡ By Section 2, Regulation 26, 1793, the minority of both Moohummudans and Hindoos is declared to extend to the end of the eighteenth year.

‖ Liberantur tutelâ masculi quidem pubertate. Puberem autem *Cassiani* quidem eum esse dicunt qui habitu corporis pubes apparet; id est, qui generare potest. *Proculeii* autem, eum qui quatuordecim annos explevit. Verum *Priscus* eum puberem esse in quem utrumque concurrit, et habitus corporis et numerus annorum. *Pandect. Justin.* lib. xxvi, §§ ix.

ward are remarkable for their equity and good sense: while scrupulously regardful of the interests of the minor, he is nevertheless not exempted from responsibility, where justice obviously requires that he should be considered liable. On perusing the chapter treating of these subjects (page 64 of this work) it will be seen, that the provisions relating to them do not differ very widely from those contained in Colebrooke's Dissertation on Obligations and Contracts, book iv, chap. x, §§ 584, *et passim,* which I have subjoined in a note,* in juxtaposition with the original passages of Moohummudan Law on the same subject.

The question of Moohummudan slavery seems to be but little understood: according to strict law, the state of bondage, as far as Moosulmauns are concerned, may be said to be almost extinct in this country. They only are slaves who are captured in an infidel territory in time of war, or who are the descendants of such captives.

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* The promise or executory agreement of a minor, not apparently beneficial, and still more, one that is on the face of it prejudicial to him, is absolutely void. An engagement apparently beneficial to him is only voidable, yet a contract made by a minor, with the advice and consent of his friends, will be held binding where in conscience it ought. Minors may be charged for trespasses and torts: they are bound by obligations arising from delinquency.

ويتوقف عقوده المترددة بين النفع و الضرر على اجازة وليه و يصح
قبضه للهبته و لا يتوقف من اقواله ما تمحض ضررا و منه اقراضه
واستقراضه لو محجورا لا لوكان ما ذونا والحجر عليه في الاقوال
كلها لا في الافعال فيضمن ما اتلفه اشباه و نظاير

Perhaps there is no point of law which has been more deliberately and formally determined than this. Its accuracy, it might have been hoped, was established beyond all question; and yet it is only very lately that a contrary opinion was delivered by a law officer belonging to one of the courts of judicature under this Presidency. I subjoin it, with a translation,* as a curious spe-

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* سوال

شرعاً بچند وجه ملکیت بر غلام و کنیز حاصل مي شود

فتوی

اصل در آدمي حرّیت است و نزد اکثر علما نیست سبب تملک
آدمي مگرِ کفر و بود نس در دار حرب مع شرط استیلاء وچونکه کفر
و سکونت در دار حرب در آدمي جمع شوند آنوقت جمیع احکام
مال مباح برو جاري مي شوند لیکن چونکه ملکیّت مال مباح موقوف
بر استیلا است برو مانند استیلاء که بر دیگر اموال مباحات که اشجار
و گیاه و کلاء و غیره است ملک در آدمي متحقق نگردد بي استیلا
چنانکه درجملهٔ اموال مباحه که بي مالک باشند چنانچه درجامع الرّموز
و غیره مذکور است اَلْکُفّار اَرِقّاءُ فِي دارِ حَرْبٍ وَاِنْ لَمْ یَکُنْ مِلْکٌ لِاَحَدٍ
عَلَیهِمْ پس هرگاه باثبات رسید که کفار در دار حرب مال مباح اند
وقوع ملکیّت بر ایشان موقوف بر استیلاء است و این استیلا منحصر
برچند قسم است یکي انکه چون امام اهل اسلام فتح کند شهري از
شهرهاء دار حرب و اسیر کند اهل آن شهر را پس امام مختار است در
قتل یا ترقیق شان چنانچه در هدایه مذکور است اِذَا فَتَحَ الْاِمَامُ بَلْدَةً
مِنْ بِلَادِ اَهْلِ الْحَرْبِ عَنْوَةً فَهُوَ فِي الْاَسَارَي بِالْخِیَارِ اِنْشَاءَ قَتَلَهُمْ وَاِنْشَاءَ

cimen of the arguments and devices not unfrequently used to mislead, and to perplex the simplest question. The

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* اِسْتَرَقُّهُمْ و چون بنده کند پس آنها در حکم مال مي شوند و جاري مي شود دران خريد و فروخت وارث و هبه و غيره عقود شرعيّه مثل ديگر اموال و اولاد همچو کنيزان نيز که بکسي اجنب مولاي شان نکاح کند بنده و کنيز مولاي خود خواهند شد دوم اينکه چون استيلا يابند بعضي از اهل حرب بر بعضي ديکر و اسير سازند ايشان را مالک آنها شوند چنانچه در فتح القدير و عالمگيري و هدايه مذکور است اِذَا غَلَبَ كُفَّارُ التُّرْكِ عَلَى كُفَّارِ الرُّومِ فَسَبَوْهُمْ وَاَخَذُوا اَمْوَالَهُمْ مَلَكُوهُ فَاِنْ غَلَبْنَا عَلَى التُّرْكِ حَلَّ لَنَا مَا نَجِدُهُ مِمَّا اَخَذُوهُ سيوم اينکه چون بادشاه اهل حرب از دار خود مردان و زنان را گرفته بطرف بادشاه يا کسي از اعزه اهل اسلام هديه فرستد آنکس مالک آن گردد چنانچه مقوقس بادشاه مصر در سکندريه ماريه قبطيه را بحضرت رسالت پناه محمد صلى الله عليه و سلم بهديه فرستاد و آن حضرت احکام کنيز دروي جاري داشت چهارم اينکه چون مستامن در دار حرب رفته با کسي از زنان اهل حرب بظاهر نکاح کرد و مهرش باولياي او داده او را بقهر و غلبه از دار حرب بيرون آورد مالک او گردد چنانچه در فتح القدير و غيره مذکور است وَلَوْ تَزَوَّجَ اِمْرَاَةً فِي دَارِ حَرْبٍ مِنْهُمْ ثُمَّ اَخْرَجَهَا اِلَى دَارِ الْاِسْلَامِ قَهْرًا فَيَصِحُّ النِّكَاحُ وَيَصِحُّ بَيْعُهُ فِيْهَا پنجم اينکه چون داخل شود مسلم با مان در دار حرب و خريد از اهل آن دار پسري يا دختري و بغلبه و قهر بيرون آورد اورا مالک گردد چنانچه در کتاب جامع الرموز و غيره مذکور است

two principal quotations, which are in support of his opinion, are extracted from the *Jamiooroomooz* and the

وَلَوْ دَخَلَ دَارَهُمْ مُسْلِمٌ بِاَمَانٍ ثُمَّ اشْتَرٰی مِنْ بَعْضِهِمْ اِبْنَهُ ثُمَّ اَخْرَجَهُ اِلٰی دَارِ الْاِسْلَامِ قَهْراً مَلَكَهُ وَ اَكْثَرُ الْمَشَايِخِ عَلٰی اَنَّهُ لَا يَمْلِكُهُ فِيْ دَارِهِمْ وَ هُوَ الصَّحِيْحُ ششم اینکه چون کسي از اهل اسلام یا حربي از دار دیگر در دار حرب بامان یا بغیر آن رفته بدزدي یا قزاقي ادمي اهل حرب را گرفته بدار الاسلام آرد یا در دار حرب دیگر برد مالک او گردد چنانچه در ابراهیم شاهي و سراجیه و غیره مذکور است مُسْلِمٌ دَخَلَ دَارَالْحَرْبِ بِاَمَانٍ فَسَرَقَ صَبِيّاً وَاَخْرَجَهُ اِلَيْنَا يَصِيْرُ مُسْلِماً بِخِلَافِ مَالَوِ اشْتَرَاهُ هُنَاكَ ثُمَّ اَخْرَجَهُ فَاِنَّهُ عَلٰی دِيْنِهِ وَلَمْ يَذْكُرْ فِي الْفَصْلِ الْاَوَّلِ اَنَّ الصَّبِيَّ حُرٌّ اَوْ عَبْدُهُ يَنْبَغِيْ اَنْ يَكُوْنَ عَبْدَهُ وَسَمِعْتُ اُسْتَاذِيْ اِفْتِخَارَ الْاَئِمَّةِ طَاهِرَ الْبُخَارِيْ قَالَ قَدْ اِشْتَرَيْتُ تُرْكِيَّةً وَ نَكَحْتُهَا لِاحْتِمَالِ اَنَّهَا اُخْرِجَتْ بِالسَّرِقَةِ اَوْ بِالْخِلَابَةِ وَغَيْرِ ذٰلِكَ فَهٰذَا يَدُلُّ عَلٰی اَنَّهُ لَيْسَ بِعَبْدٍ وَلٰكِنَّ الظَّاهِرَ اَنَّهُ عَبْدٌ فَهُوَ عَبْدُهُ لِاَنَّ سَبَبَ الْمِلْكِ اِنَّمَا هُوَ الْاِخْرَاجُ اِلَيْنَا بِطَرِيْقِ الْقَهْرِ وَ الْغَلَبَةِ وَهٰذَا الْمَعْنٰی مَوْجُوْدٌ فِي السَّرِقَةِ هفتم اینکه چون حربي از دارحرب بي استیمان در دار الاسلام داخل گشت وگرفت او را کسي از اهل اسلام ملک عامه مسلمین گردد یا ملک کسیکه اورا گرفته است چنانچه در ابراهیم شاهي و غیره مذکور است حَرْبِيٌّ دَخَلَ اِلَيْنَا بِغَيْرِ اَمَانٍ فَاَخَذَهُ رَجُلٌ فَهُوَ لِعَامَّةِ الْمُسْلِمِيْنَ وَ قَالَ اَبُوْ يُوْسُفَ وَ مُحَمَّدٌ رَحِمَهُمَا

Ibrahim Shahee. The words which are underlined were entirely omitted in the Futwa, and it will be observed, that the omissions are important. The term قهرا which

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اللّهُ هُوَ الَّذِي اخذه درايں همه اقسام استيلای مسلم بردار حرب
خواه از بادشاه اسلام بر کفار اهل حرب جهاد و حرب قايم باشد
يانه اگر بکدامي قسم ازين استيلاء آدمي دار حرب بدست اهل
اسلام افتد احکام عبد و کنيز شرعي جاري خواهد شد و چون
در اکثري از بلاد خصوصاً در هندوستان از مدتی رسم جهـاد
مفقود است بديگر طريق استيلاء مرقوم الصدر بيع و شرى غلام و
کنيز جاري است و نيز بعضي علماء بيع حر در ايام مخمصه و سال
قحط جايز داشته اند چنانچه در فتاوي عنايه و ذخيره و محيط و غيره
مذکور است سُئِلَ محمّد رح ما تقولُ فِي بيعِ الحُرِّ بِسَبَبِ هلاكِ
النَّفْسِ بالقحطِ قالَ بيعُ الحُرِّ نفسَهُ بذلكَ السَّبَبِ جايزٌ و بدونِها
لا يجوز و سُئِلَ عن وطيِ المشتري الجاريةَ مِنْ هذالبيعِ هَلْ جازام
لا قالَ جازَ و ولدهُ صحيحُ النَّسَبِ و ذَكَرَ فِي المحيطِ و لا يجوز بيع
الحُرِّ الا ان يعجز عن اداءِ مالٍ وجبَ فِي ذِمَّتِهِ او هو مضطرٌّ و قعَ فِي
مهلكةٍ لايرى بقاء حيوتهِ الا ان يبيع نفسهُ اذ فِي مخمصةٍ يحلُّ له
الجيفةُ فبيعهُ نفسهُ اولى مِن اكلِ الجيفةِ لانَّ النّاسَ كانوا يبيعون
انفسهم فِي زمانِ يوسفَ عليهِ السّلامُ و نيز در فتاوي مختصر شافي
است که فروختن دولي کشان و کوليان يعني حايکان دهاليان
و مانند آن که از طايفهٔ کفار اند ذاتهاي خود را في غير قحط و مخمصه
درست است باعتبارِ التعارفِ لانَّ تعارفَ كُلِّ دِيارٍ معتبرٌ بايِّ
طريقٍ كانَ التعارفُ جارياً بينهم که بهمين روايت بجواز بيع و شرى

is the very essence of the sentence, is twice omitted; and it is solely from the use of that word, which sig-

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بر کفار ابندیار و کوهستانیان بذاتهاي خود خواه پسر و دختر و زوجهٔ خود را درصورت جاري بودن تعارف وعدم مضائقه بينهم بعضي علماء فتوی داده اند و اینهم کنیز شرعي مي تواند شد فقط ٠

Question:—Legally, by how many means is the right of property over male and female slaves acquired?

Answer:—The original condition of man is freedom, and, in the opinion of the generality of lawyers, mankind becomes a subject of property, solely by reason of infidelity and residence in an hostile country, joined to the fact of subjugation. When infidelity and residence in an hostile country are united in the same individual, all the qualities of neutral property attach to him. But, as the proprietary right to neutral property depends on subjugation, they continue without proprietors until they are appropriated, in like manner as dominion is established over other property, such as grass, trees, herbs, &c. &c. as is laid down in the *Jami oo roomooz* and other authorities; "infidels are slaves in an hostile country, although not the property of any individual." It is proved therefore that infidels in an hostile country are neutral property, and that the proprietary right to them depends on subjugation; but subjugation may be accomplished by various means. One mode is when a Moohummudan ruler conquers an infidel city and makes captive its inhabitants, in which case he is at liberty either to kill or enslave them, as is laid down in the *Hidaya*; "if an *Imam* conquer an infidel country by force of arms, he is at liberty either to slay the captives, or to enslave them." When they are made slaves all the qualities of property attach to them, and they become subjects of purchase, sale, inheritance, and all other legal contracts, in the same manner as other property. The offspring also of female slaves whom their masters may have given in marriage, are the property of their masters. A second mode is when the inhabitants of one hostile country subjugate those of another and make them prisoners; in such case proprietary right is established, as is laid down in the *Futtih ool qudeer*, the *Aulumgeeree* and the *Hidaya*; "if infidels of Turkistan conquer infidels of Rome and make captives of them or seize their property, they are the rightful proprietors; and if Mussulmans should afterwards conquer those infidels of *Turkistan*, whatever property of the infidels of *Rome* they may find with those infidels of Turkis-

nifies *vi et armis*, that any support is derived to the doctrine, of infidels taken by robbery, being slaves in the

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tan, is lawful to them." A third mode is when the king of an hostile state, having seized men and women, sends them from his own country as presents to a Moohummudan king or other person of distinction; in such case proprietary right is established, as *Mokawkus*, the governor of Egypt, sent Mary the Copt from Alexandria as a present to the Prophet, who treated her as a slave. A fourth mode is when a *Moostamin*, having gone into an hostile country, submits to the form of marriage with an infidel woman, and pays the amount of her dower to her guardians, and brings her out of that country by force and arms: in such case proprietary right is established, as is laid down in the *Futtih ool qudeer* and other authorities; "if a person marry an infidel woman in an hostile country, and then forcibly bring her into a Moosulmaun territory, the marriage will be good and she will become a subject of sale." A fifth mode is when a Moosulmaun enters a hostile country under protection, and purchases from one of the inhabitants of that country his son or daughter, in such case proprietary right is established, as is laid down in the *Jami oo roomoz* and other authorities: "if a Moosulmaun enter their country under protection, and purchase from one of them his son, and and then bring him forcibly into a Moosulmaun territory, he becomes the proprietor of him; but the generality of lawyers are of opinion that the purchaser is not proprietor of him in his own country, and this is the correct opinion." A sixth mode is when a Moosulmaun or an infidel alien enters a hostile country, whether with or without protection, and takes an inhabitant of that country either by theft or plunder, and brings him either into a Moohummudan or into another country, in such case proprietary right is established; as is laid down in the *Ibrahim Shahee*, the *Sirajyah*, and other works; "if a Moosulmaun enter an hostile country under protection, and having taken a boy by robbery bring him to us, the boy will be a Moohummudan: the contrary would be the case if he had purchased, and then brought him out, in which case he would continue of his own religion. It is not mentioned in the case first put, whether the boy should be considered free or a slave. It is fit however that he should be considered a slave. I heard my preceptor Iftikhar ool Ayma Zahir Ul Bokharee say, that he had purchased a female native of Turkistan, and that he married her under the apprehension that she might have been taken by robbery, or fraud, or similar means. From

legal acceptation of the term; the exertion of such force being held by some authorities to constitute *isteela* or

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this it would follow that a person so taken is not a slave, but the received opinion is that he is a slave, inasmuch as the cause of proprietary right is the taking *vi et armis*, which the term "robbery" may imply." The seventh mode is when an infidel alien enters a Moohummudan territory, without seeking protection, and a Moosulman seizes him, in which case he is the property of the whole Moosulmaun community; as is laid down in the *Ibrahim Shahee* and other works; "if an infidel alien enter a Moohummudan territory without protection, and a man seize him, he becomes the property of the whole community of Moosulmauns; and, according to the opinion of *Yoosuf* and *Moohummud*, he belongs to the seizer alone. If, by any one of these various modes of subjugation, the inhabitant of an hostile territory come into the possession of a Moohummudan, he will be subjected to the laws of slavery, even though no holy war be waged against the infidel country; and, as in most countries, particularly in *Hindostan*, holy wars have ceased to be waged, the practices of purchase and sale, and the other modes of subjugation abovementioned prevail. Some lawyers also have maintained the validity of the sale of freemen in difficulty and famine, as is laid down in the *Futawa Itabeeya*, the *Zukheera*, the *Moheet* and other authorities; "Moohummud was interrogated relative to the case of a freeman who sold himself from fear of perishing through famine: he replied, that the sale of himself by a freeman, under such circumstances, is allowable, but not otherwise. He was further questioned as to whether connexion with a female, sold under such circumstances, was legal: and he replied in the affirmative, and that the parentage of the offspring would be established in the father." It is stated in the *Mooheet* that the sale of a freeman is not allowable unless he be unable to discharge a debt which is due from him, or unless he be distressed, being involved in difficulties which endanger his existence, or be reduced to such an extremity as would justify his eating carrion (in which instances it is lawful) because in the time of Joseph, men were in the habits of selling themselves. It is laid down in the *Futawa Mokhtusuri Shafee*, that it is allowable for weavers, coblers, and certain other descriptions of infidels, to sell their own persons, even though not in time of famine or difficulty, conformably to usage: "for the usage of each country is different, and the peculiar usage, whatever it may be, is allowable." On this authority many lawyers have given opinions as to the validity of pur-

subjugation. The Story of Mary the Copt is quite out of place,* as it is notorious that Moohummud had many

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chase and sale by the infidels of this country, and by the mountaineers of their own persons and of their wives and children, should it be customary and not objected to among them; and persons thus sold are also legal slaves.

* I cannot perhaps better verify this assertion than by quoting an extract from a note of the learned Sale on the chapter of the *Korân* which was revealed to enable Moohummud to absolve himself from an engagement which he had made to refrain from cohabiting with the said Mary, "Mohammed having lain with a slave of his, named Mary, of Coptic extract, (who had been sent him as a present by Al Mokawkas, governor of Egypt,) on the day which was due to Ayesha, or to Hafsa, and as some say, on Hafsa's own bed, while she was absent, and this coming to Hafsa's knowledge, she took it extremely ill, reproached her husband so sharply, that, to pacify her, he promised with an oath, never to touch the maid again (2); and to free him from the obligation of this promise was the design of the chapter. I cannot here avoid observing, as a learned writer (3) has done before me, that Dr. Prideaux has strangely misrepresented this passage. For having given the story of the prophet's amour with his maid Mary, a little embellished, he proceeds to tell us, that in this chapter Mohammed brings in God, allowing him, and all his Moslems, to lie with their maids when they will, notwithstanding their wives: (whereas the words relate to the prophet only, who wanted not any new permission for that purpose, because it was a privilege already granted him (1), though to none else:) and then, to shew what ground he had for his assertion, adds, that the first words of the chapter are, O prophet, why dost thou forbid what God hath allowed thee, that thou mayest please thy wives? God hath granted unto you to lie with your maid-servants (2). Which last words are not to be found here, or elsewhere, in the Korân, and contain an allowance of what is expressly forbidden therein (31); though the doctor has thence taken occasion to make some reflections which might as well have been spared. I shall say nothing to aggravate the matter; but leave the reader to imagine what this reverend divine would have said of a Mohammedan, if he had caught him tripping in the like manner." It is written also in the *Korân*, "O Prophet, we have allowed thee thy wives unto whom thou hast given their dower, and also the slaves which thy right hand possesseth, *of the booty* which God hath granted thee," on which Sale has observed in a note, "It is said, therefore, that the women slaves which he should buy are not included in this grant." Sale's Koran, vol. II, page 281.

privileges which are denied to the votaries of his religion. Without further comment I leave the reader to judge of the *animus* which dictated the misquotation.

Of those who can legally be called slaves but few at present exist. In the ordinary acceptation of the term, all persons are counted slaves who may have been sold by their parents in a time of scarcity, and this class is very numerous. Thousands are at this moment living in a state of hopeless and contented, though unauthorized, bondage. That the illegality of this state of things should be known is certainly desirable. The law may interpose its authority in cases of peculiar hardship and cruelty. I believe, however, it will be found, that there is little moral necessity for such interposition. In India (generally speaking) between a slave and a free servant there is no distinction but in the name, and in the superior indulgences enjoyed by the former: he is exempt from the common cares of providing for himself and family: his master has an obvious interest in treating him with lenity, and the easy performance of the ordinary household duties is all that is exacted in return. The importation of slaves by sea has been prohibited, and human beings, it may be hoped, have, in this quarter of the world, ceased to be commodities of merchandize. The sales of children, which do take place, are (setting aside the fact of their illegality) devoid of all the disgusting features which characterize the Slave Trade: they are not occasioned by the *Auri sacra fames*, but by absolute physical hunger and starvation; and the morality must be rigid indeed, which would condemn as criminal, the act of a parent parting with a child, under circumstances

*which render the sacrifice indispensable to the preservation of both.**

Slaves, in the legal acceptation of the term, are certainly considered merely as *things:* they are subject, as other property, to the common Law of Inheritance; and they cannot be manumitted to the prejudice of heirs or creditors; they may, by special licence, be allowed to trade, but, generally speaking, they have no civil rights or capacities.

The rules relative to endowments are worthy of attention: under the existing regulations, it is true, that a check has been put to appropriations of land for pious purposes; but there still remain many ancient endow-

* Since writing the above I have met with some observations of Mr. H. T. Colebrooke in the third volume of Mr. Harington's Analysis, pages 745 and 747, which so fully justify the opinion I have ventured to express, that I cannot resist the gratification of quoting them here, "Indeed, throughout India, the relation of master and slave appears to impose the duty of protection and cherishment on the master, as much as that of fidelity and obedience on the slave: and their mutual conduct is consistent with the sense of such an obligation; since it is marked with gentleness and indulgence on the one side, and with zeal and loyalty on the other. During a famine, or a dearth, parents have been known to sell their children for prices so very inconsiderable, and little more than nominal, that they may, in frequent instances, have credit for a better motive than that of momentarily relieving their own necessities, namely, the saving of their children's lives, by interesting in their preservation persons able to provide nourishment for them. The same feeling is often the motive for selling children, when particular circumstances of distress, instead of a general dearth, disable the parent from supporting them. There is no reason to believe that they are ever sold from mere avarice, and want of natural affection in the parent: the known character of the people, and proved disposition in all the domestic relations, must exempt them from the suspicion of such conduct: but the pressure of want alone compels the sale, whether the immediate impulse be consideration for the child, or desire of personal relief."

ments scattered over different parts of India, which the liberality of the British Government has permitted to continue devoted to the purposes designed by their founders. The authority which the State has reserved to itself over these institutions is merely intended for the purposes of preservation, and is consistent with what the Moohummudan Law itself permitted to the ruling power.*

The rules relative to debtors, in general, are extremely lenient: perhaps the most prominent instance of this, which can be cited, is the case of several persons contracting a joint obligation in favour of another. As the principles of the Moohummudan Code exactly coincide with those of the Civil Law, I cannot exemplify the rules on the subject more effectually than by extracting the following passage from Pothier, "Solidity may be stipulated in all contracts of whatever kind; but regularly, it ought to be expressed; if it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part. And this is confirmed by Justinian in the Novel (99). The reason is, that the interpretation of obligations is made, in cases of doubt, in favour of debtors, as has been shewn elsewhere. According to this principle, where an estate belonged to four proprietors, and three of them sold it *in solido*, and promised to procure a ratification by the fourth proprietor, it was adjusted that the fourth, by ratifying the sale, was not to be considered as having sold *in solido* with the others: for, although the three had promised that he should accede to the contract of sale,

* See Prin. Endowments, pages 69, 70 & 71, and Regulation XIX, 1810, for the due appropriation of the rents and produce of lands granted or the support of mosques, temples, colleges, and other purposes, &c. &c.

it was not expressed that he should accede *in solido*."* Numerous other examples might be adduced to show that the Law leans entirely in favour of those against whom a claim may be made, and who may have committed no wilful wrong. This system, if not in all cases reconcileable with strict justice, is at least captivating, from the apparent benevolence of the motives by which it is governed.

The rules relative to the pursuit of remedies by action do not seem to require particular comment. Superseded as they have been by the Regulations of Government, they are now rather matter of curiosity than utility. Their provisions more nearly assimilate to those of the Civil Law than our own. Thus, the oath of the parties, or their refusal to swear, constitutes one mode of arriving at judgment, in default of better evidence.† A defendant may plead the general issue, and at the same time adduce special matter to evade the plaintiff's claim. If the special matter so pleaded be such, that, by the failure to prove it, the claim of the plaintiff would not be established, the *onus probandi* does not rest with the defendant; although, by the proof of it, the claim of the plaintiff would fall to the ground, for it is a maxim, that, "*ei incumbit probatio qui dicit non qui negat*."‡ But

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* Vol. I, page 147.

† In speaking of the defects of the Common Law, Mr. Justice Blackstone observes, "The principal defects seem to be, first, the want of a complete discovery by the oath of the parties. This each of them is now entitled to have by going through the expence and circuity of a court of equity; and therefore it is sometimes had by consent, even in the courts of law." Vol. 3, page 381.

‡ اَلْبَيِّنَةُ عَلَى الْمُدَّعِي وَالْيَمِينُ عَلَى مَنْ اَنْكَرَ هدايه

where the special plea is such, that, by the failure to prove it, the claim of the plaintiff would be established, the *onus probandi* rests with the defendant. As if, in case of a debt upon contract, the defendant were to plead "*nihil debet,*" and at the same time to alledge the poverty of the plaintiff to have been such as to be incompatible with his demand. Here, if he failed to prove the latter allegation, the claim of the plaintiff would nevertheless remain to be proved, and, to put the defendant therefore to the proof of it would be mere waste of time. But if he were to plead "*solvit ad diem,*" the *onus probandi* would rest with him, because here, on failure of proof, the claim of the plaintiff would be established.

It is a general rule, that no claim is admissible which is repugnant to a former admission of the claimant, and which cannot consistently stand with such admission; for instance, a person having admitted that a certain article was the property of another, cannot afterwards claim such article on the plea of his having purchased it at a period antecedent to that of his having made the admission; nor can a person, having adduced a claim to property, either in virtue of purchase or of inheritance, subsequently claim the same property in virtue of alledged gift, though if the claim in virtue of gift had been prior in point of date, a subsequent claim, either of purchase or of inheritance, would have been maintainable.*

* As I did not deem the points of Mohummudan Law, contained in this and the following passages, to be of such prominent importance as to warrant their admission among the principles, the authorities for which have been separately laid down, I think it better to cite, as I go along, the original text, and the following extracts from the *Futawa-i-Hummadee* and other works, will serve to show that the doctrines here laid down are conformable to the law of which I am treating;

If a person claim the proprietary right to any thing, specifying a date from which his right began to accrue, and the party in possession plead proprietary right in virtue of purchase, also specifying a date from which his right began to accrue, for instance, if A sue B for a house in the possession of B, stating that he (A) acquired the right to it a year ago, and B adduce evidence to prove that he purchased it from C two years ago, this evidence will not avail B, because he merely stands in the place

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اذا ادّعى رجل دارا في يد رجل انّها داره ورثها من ابيه ثمّ ادّعى
انّها اشتراها من ابيه في حيوته و صحّته و اقام على ذلك بيّنة لاتقبل
و بمثله لو ادّعى الشراء اوّلا من ابيه في حيوته و صحّته ثمّ ادّعى
الارث و اقام على ذلك بيّنة تقبل بيّنته لانّ في الفصل الاوّل التوفيق
بين الكلامين غير ممكن فيثبت التناقض و في الفصل الثاني التوفيق
بين الكلامين ممكن فلا يثبت التناقض فتاوى حمّادي المدّعي
متى اقام البيّنة على ما ادّعى و قد سبق منه الاقرار بخلاف ما ادّعى
ينظر ان تعذّر التوفيق بين الاقرار و بين الدعوى بان اقرّ مثلا انّ
هذا العبد لفلان ثمّ ادّعى الشراء من فلان سابقا على اقراره لا تقبل
منه البيّنة لانّ التوفيق بعد الاقرار و الدعوى متعذّر لمكان التناقض
لانّه ادّعى الملك لنفسه في الزمان الّذي اقرّبه لفلان كانّه قال هذا
العبد لفلان ولي في الحال فتاوى حمّادي

of C, whose proprietary right to the house it is necessary to prove before the transfer can acquire validity; and inasmuch as the possession of the purchaser rests on the same title as that of the seller, the case is the same as if A had sued C originally; in which case the evidence of A would have been entitled to preference; it being a maxim in law, that evidence is wanting to prove a right not *primâ facie* apparent, and between the person in possession and the person out of possession, the evidence of the latter is entitled to preference, his title not being *primâ facie* the more apparent. This rule is universally admitted to apply if A and B had not specified dates, or if they had specified the same date; but if they specified different dates the evidence of the claimant who asserts the prior date should, according to one opinion, be received in preference, whether he be in or out of possession.* If C claim property in the possession of B,

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* اذا ادعى الخارج الملك المطلق مورخا و ادعى صاحب اليد الملك بسبب الشراء مورخا صورته دار في يد رجل و ادعى رجل انها داره ملكها منذ سنة و اقام صاحب اليد بينة انه اشتراها من فلان منذ سنتين و هو يملكها و يقبضها منه قضي بها للمدعي الخارج لان صاحب اليد خصم عن بائعه في اثبات الملك له ليمكنه اثبات الانتقال الى نفسه فكان بائعه حضر و اقام البينة على الملك المطلق لنفسه و الدار في يده لان يد المشتري يد البائع من حيث التقدير و لو كان كذلك كان يقضي ببينة الخارج و ان كان العين في يد احدهما

which he (B) had purchased from A, alledging that A had previously farmed or pawned it to him, no action will lie against B until C produce A, and prove his assertion against him; and if A bring an action against B for property in the possession of the latter, and B plead that the property belongs to C from whom he had received it in pledge or the like, this is a sufficient answer to the claim; but if A's claim be founded on any act done by B, for instance, if he alledge that B had stolen or usurped the property, it is not sufficient that B plead his having obtained the property from a third person, because here a specific act is alledged, independently of the question of proprietary right, which is quite distinct; for a person not in possession might be charged with it, whereas, in a claim of proprietary right, an action against the party in possession alone is maintainable.* If A sue B for pro-

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ان لم يورخا اوارخا و تاريخهما سواء فالخارج اولى وان ارخا واحدهما اسبق يقضي لاسبقهما كان خارجا او صاحب اليد وهو قول ابي يوسف رح الاخر وفي قول محمد رح الاخر الخارج اولى فتاوى حمادى

* رجل باع من اخر شيا فادعى ثالث ان البايع اجر منه المبيع او رهنه منه قبل ان يبيع من فلان لا خصومة بين المدعى و بين المشتري حتى يحضر البايع فاذا حضر واقام عليه البينة الان تقبل بينته قال المدعى عليه هذا الشي اودعنيه او اجرنيه او اعارنيه فلان الغائب او رهنه او غصبه منه و برهن عليه دفعت خصومة

perty, of which B is in possession, and B reply that he had purchased it from A himself, analogy would suggest that B be immediately dispossessed of the property, because he admits the fact of the property having belonged to A, and adduces a new claim by purchase on his own account; but by a more favourable construction (which is always preferred to analogy) the rule of practice is, that B should be continued in possession for three days, on security, to enable him to adduce proof of his allegation.*

المدعي وان قال المدعي غصبته مني او سرقته مني لايندفع الخصومة و ان اقام ذوالید البینة علی الودیعة لانه انما صارخصما بدعوي الفعل لابیده فلا یندفع دعواه باحالة الملک الی غیره لانه لم یدعي الملک علیه و انما ادعي علیه الفعل بخلاف دعوی الملک المطلق صارخصما فیه بیده حتی لایصح دعوي الملک علی غیر ذي الید و یصح دعوي الفعل فتاوي حمادي

* دارفي یدی رجل فاقر الذی في یدیه انه اشتراها من المدعی فالقیاس ان ینزع الدار من یدیه و یدفع الی المدعي حتی یقیم البینة انه اشتراها منه لانه اقر بانه ملکه الا انه یدعی الشراء منه فیحکم باقراره في الحال حتي یثبت الشراء و في الاستحسان ان یترک الدار في یدیه ثلثة ایام و یوخذ منه کفیلا حتي یقیم البینة علی الشراء لانه لو اقام البینة ظهر انه لا فایدة في الانتزاع ولیس في الترک کثیر ضرر علی المدعي فیترک فتاوی حمادی

If a person being sued for a debt, answer that he owes it, but that it was contracted in gambling, or by other unlawful means, his evidence to this plea should be received, if he have any, and if he have no evidence, his denial on oath should be credited, because his admission of the debt was coupled with a plea which avoided it.* In the case of any specific article claimed from the estate of a person deceased, one of the heirs may defend the suit; but not if the specific article claimed be not in the possession of the heir against whom the action is brought. It is different in the case of a debt, as in such case one heir may defend the suit, even though he may have no assets in his hands.† If a person having sold some

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* ادّعي علي غيره مالاً فاقرّ المدّعي عليه بذلك الّا انّه بيّن ما لا يصلح
سبب الوجوب بان قال له عليّ الف درهم بسبب القمار او قال
لانّي اشتريت منه الميتة و كذّبه المدّعي في ذلك السبب فان اقام
المدّعي عليه بيّنةً علي ذلك يندفع عنه دعوي المدّعي . وان لم يكن
للمدّعي عليه بيّنة علي ذلك ذكر الخصّاف في ادب القاضي انّه
يحلّف المدّعي عليه و يكون القول قوله مع اليمين لانّ قوله عليّ الف
درهم لانّي اشتريت منه الميتة او لانّي قامرت عليه جحود المال اصلا
فيكون القول قوله مع اليمين

† فالحاصل انّ احد الورثة ينتصب خصما عن الميّت في عين هو
في يد ذلك الوارث لا في عين ليس في يده حتّي انّ من ادّعي

property to another, afterwards desire to rescind the contract, on the plea of his not having been authorized to make it, his claim is inadmissible; because the fact of his having entered into the contract is proof against him of his admission, either that the property was his own, or that he had due authority to make the sale, and, under such circumstances, he cannot be permitted to adduce evidence which would be repugnant to his own admission; nor can he put the defendant to his oath in this case, if he have no evidence, because the taking of evidence, on the part of the plaintiff, and the administration of an oath to a defendant, are consequent to the admissibility of a claim, but the claim itself is in this instance inadmissible.* In cases of deposit, gene-

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عينًا من التركة و احضر وارثا ليس ذلك العين في يده لا يسمع دعواه عليه و في دعوى الدين احد الورثة ينتصب خصمًا عن الميت و ان لم يكن في يده شيي من التركة فتاوي حمادى

* رجل اشترى من رجل عبدا ثم ان البائع ادعى انه كان فضوليا في هذا البيع واراد استرداد العبد من يد المشتري و انكر المشتري ذلك او ادعى المشتري ان البائع فضولي في هذا البيع و اراد رد العبد و استرداد الثمن لا يصح دعواه لان اقدامه على هذا العقد اقرار منه بصحة هذا العقد و ذلك بالملك له او بالامر من المالك و الذي يدعي كونه فضوليا في البيع لا يسمع بينته و كذلك لولم يكن بينته

rally, where there is a dispute either about the restoration or the loss of the article deposited, the presumption is in favour of the depositary, and his assertion and the evidence adduced by him are entitled to preference in matters simply of trust, where no responsibility would be incurred in the event of the proof of the allegation; but if the allegation be of such a nature as would leave responsibility attaching to the depositary, notwithstanding the proof of the plea, the evidence which he adduces for his own acquittance should be preferred, but not his assertion; for instance, where there is no evidence, if a depositary were to plead that he had returned the deposit by a member of his own family, his assertion on oath should be credited, but not if he pleaded that he returned it by a stranger; because, it is lawful for a depositary to entrust a deposit to the members of his own family, but not to strangers.* If the proprietor of a deposit desire

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و اراد ان يحلف صاحبه على ما ادعى من كونه فضوليا في البيع ليس له ذلك لان سماع البينة و التحليف يترتبان على صحة الدعوى و هذا الدعوى لم يصح هنها لمكان التناقض فتاوى حمادي

* الحاصل ان في كل موضع كان المال امانة في يده فالقول قوله في الدفع مع اليمين و كذا البينة بينته ان كان المال مضمونا عليه و البينة بينته على الابقاء و لا يكون القول قوله مع اليمين المودع اذا قال بعثت بالوديعة اليك مع رسولي و سمي بعض من في

the depositary to deliver it to his (the proprietor's) brother, and on the brother coming to take it accordingly, the depositary tell him to come again for the purpose of receiving it, and on the brother's return he tell him that the property was lost before he came for it the first time, the presumption will be against the depositary, and he will be responsible for the value of the deposit, from the manifest inconsistency of the latter assertion. If the proprietor of a deposit desire the depositary to deliver it to a third person, and the depositary assert that he had done so, the person specified, and the proprietor both denying his assertion, the presumption will be in favour of the depositary, and his assertion on oath* is to be credited; but the third person is nevertheless not to be held responsible. If, however, the proprietor deny having desired that the property should be delivered to a third person, the presumption will be in his favour, his assertion on oath is to be credited, and the depositary should be held reponsible. So, also, if the third person admit having received the deposit, but state that he had lost it, and the proprietor deny having commissioned the third person to receive it, the presumption will be in favour of the proprietor, and the depositary will be responsible; nor will he have any remedy against the person to whom he delivered the deposit, unless that person had become

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عِيالِهِ فهو كقولِهِ رددتها عليك يكون القول قوله مع اليمين و اِن قالِ بعثت بها اِليك مع اجنبيٍ* كان ضامنا اِلاَّ اَن يقرّ صاحب الوديعةِ انّها وصلت اِليهِ .فتاوي حمادي

his surety for the purpose of indemnification.* If a creditor send a third person to his debtor to receive the amount of the debt due to him, and the messenger having realized the amount from the debtor, alledge that he had paid it over the creditor, and the creditor deny having received the amount, in this case the presumption will be in favour of the messenger, whose assertion on oath should be credited, and the debtor should be freed from his obliga-

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* سئل شيخ الاسلام عمن قال لمودعه اذا جاءک اخي فادفع و ديعتي
التي عندک اليه فجاء اخوه و طلب الوديعة فقال المودع عد الي
بعد ساعة لا دفعها اليک فلما عاد اليه قال انه قد كان هلک قبل
مقالتي عد الى بعد ساعة فهو ضامن لمكان التناقض اذا امر صاحب
الوديعة المودع ان يدفعها الى رجل بعينه فقال دفعتها و قال ذلک
الرجل لم اقبضها منک و قال رب الوديعة لم يدفعها فالقول قول
المستودع و لا ضمان على المدفوع اليه و يعتبر قول المودع في حق براته
عن الضمان لا في ايجاب الضمان على المدفوع اليه و لو انكر الامر
فالقول قول المودع مع اليمين و يجب المال اودع رجل عند رجل
دراهم فجاء رجل و قال ارسلني اليک صاحب الوديعة لتدفعها الي
فدفعها اليه فهلک عنده ثم جاء صاحبها و انكر ذلک فالمستودع
ضامن لها و هل يرجع على الرسول بما ضمن ان صدقه المودع في كونه
رسولا و لم يشترط عليه الضمان لا يرجع فتاوي حمادیه

tion; but if the messenger, having received the amount from the debtor, alledge that he lost it on his way back to the creditor, the loss will fall on the debtor; because it was at his option to trust or not to trust the messenger sent by the creditor, whose property it cannot be said to be, until it come to hand.* If a person, with whom property was left in deposit, assert that he gave it back to the proprietor at a certain place on a certain day, in this case it is not permitted to the proprietor to bring evidence that the depositary, on the day indicated, was not at the place where he alledged the re-delivery to have occurred; but he may bring evidence to the fact of the depositary's having acknowledged that he was at another place.† If a borrower and lender (of a horse for instance)

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* سئل ابو القاسم عن رجل له على آخر دين فارسل رسولا ليقبض دينه فذهب الرسول الى الغريم فقبض الدين منه و دفع الى المرسل فانكر المرسل الدفع اليه فالقول قول الرسول مع يمينه انه قد سلم ما قبض الى مرسله   رجل له على آخر الف درهم فقال ابعث بها مع فلان فضاعت من يد الرسول ضاعت من مال المديون و هذا بناء على ان يد الرسول يد المديون لان اختيار الرسول اليه لانه يبعث مال نفسه و بقول رب الدين ابعث بها على يد فلان لا يلزمه البعث على يده فهو معني قولنا ان يد الرسول يد المديون فلهذا كان الهلاك علي المديون   فتاوى حمادي

† في الذخيره رجل كان له عند رجل وديعة فقال المودع لرب الوديعة

dispute as to the time for which it was to be lent, or the place to which it was to go, or the burden which it was to carry, the presumption is in favour of the lender, and his assertion on oath should be credited; and if a borrower have used articles borrowed, in a certain way, and plead that he had the permission of the lender, who denies the assertion, in this case, also, the presumption is in favour of the lender, and the borrower will be answerable for any damage sustained, unless he can adduce evidence to prove the permission of the lender.*

If a person claim property, on the plea that he had deposited it with another, and the defendant deny having the deposit, and the claimant afterwards adduce evidence to prove that he had actually deposited the property with the defendant, it is still open to the defendant to plead that the deposit was destroyed or returned; because these two pleas can both consistently stand, but he cannot plead under such circumstances that he

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دفعتُ الوديعةَ اليک بمكةَ يومَ كذا فاقام ربُّ الوديعةِ بينةً انَّ المودَعَ في اليوم الذي ادّعى الدفعَ بمكّة كانَ بالكوفةِ في ذلک اليوم لم تُجزْ هذهِ الشهادةُ و لو اقامَ البينةَ على اقرارهِ انّهُ كان بالكوفةُ قُبِلت الشهادةُ فتاوى حمادي

* اذا اختلفَا المُعيرُ والمستعيرُ في الايّام او في المكانِ او في ما تُحمّل على العارية فالقولُ قولُ رب الدابّةِ مع يمينهِ و لو تصرف المستعيرُ وادّعى ان المعيرَ اذِنَ له وجَحَدَ المعير ضمِنَ المتعيرُ الا اذا اقامَ بيّنةً على الاذنِ فتاوى حمادي

never received the deposit, as that would contradict what had already been proved.* The answer of a defendant, though proved, may be repelled in certain cases by the rejoinder of the plaintiff; for instance, if a person sue another for a debt, and the defendant plead that the plaintiff had remitted it, and prove such plea, and the plaintiff subsequently bring forward evidence to prove that the defendant acknowledged the debt, he will be compelled to pay, if he made no mention of the acknowledgment in his answer, as then the remission may be presumed to have been made on account of another debt; but it is sufficient for a defendant to prove that the plaintiff, who claims property in his (the defendant's) possession, had solicited the gift of such property.†

Similarity of hand-writing is not much respected as evidence; for instance, if a man sue another for a debt, producing a written acknowledgment, which the defendant denies, the claim should not be adjudged on proof

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* لو ادعى الوديعة فانكر فاقام المدعي بينة على الابداع ثم ادعى المدعى عليه الهلاك اوالرد ان قال في الجواب و الانكار ليس لك علي شيء يسمع هذا الدفع لامكان التوفيق و لو قال ما اودعتني اصلا لا يسمع لعدم الامكان فتاوى حمادى

† رجل ادعى على آخر ستة دنانير فادعى المدعى عليه ابراءه عن الدعوى واقام البينة فادعى المدعي ثانية انه اقر لي ستة دنانير صح دفع الدفع ان لم يذكر المدعى عليه في دعوى الابراء التصديق او القبول فتاوى حمادى

of similitude of hand-writing, but if the defendant admit his hand-writing, but deny all knowledge of the contents of the document, he should not be credited, supposing the tenór of the writing to be plain, familiar, and such as is used in epistolary correspondence. The defendant will also be responsible, if the document be drawn up in legal form, such as a bond or other obligation, and if he called persons to witness that he had signed to the declaration therein contained. If a man execute a document in the presence of others, and read it to them, they are competent to bear evidence against the obligor, whether he desired them to be witnesses or not; but even though desired, they are not competent witnesses, if they are ignorant of the contents of the document. It is a general rule that the entries in bankers books should be received as good evidence.*

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* رَجُلٌ ادَّعَى عَلَى رَجُلٍ مَالاً فَانْكَرَ الْمُدَّعَى عَلَيْهِ فَاخْرَجَ الْمُدَّعِي خَطًّا بِاقْرَارِ الْمُدَّعَى عَلَيْهِ بِذَلِكَ الْمَالِ وَقَالَ هٰذَا خَطُّ الْمُدَّعَى عَلَيْهِ فَانْكَرَ الْمُدَّعَى عَلَيْهِ انْ يَكُونَ خَطَّهُ فَاسْتُكْتِبَ فَكَتَبَ وَكَانَ بَيْنَ الْخَطَّيْنِ مُشَابَهَةٌ ظَاهِرَةٌ اِخْتَلَفُوا فِيهِ قَالَ بَعْضُهُمْ يَقْضِي الْقَاضِي عَلَى الْمُدَّعَى عَلَيْهِ وَقَالَ بَعْضُهُمْ لَا يَقْضِي وَهُوَ الصَّحِيحُ وَلَوْ قَالَ الْمُدَّعَى عَلَيْهِ هٰذَا خَطِّي لٰكِنْ لَيْسَ عَلَيَّ هٰذَا الْمَالُ اِنْ كَانَ الْخَطُّ عَلَى وَجْهِ الرِّسَالَةِ مُصَدَّرًا مُعَنْوَنًا لَا يُصَدَّقُ وَيُقْضَى عَلَيْهِ بِالْمَالِ وَاِنْ لَمْ يَكُنِ الْخَطُّ عَلَى وَجْهِ الرِّسَالَةِ وَلٰكِنْ كَانَ عَلَى وَجْهِ يُكْتَبُ الصَّكُّ وَالْاِقْرَارُ فَاِنْ اَشْهَدَ عَلَى هَيْئَتِهِ بِمَا فِيهِ يَكُونُ اِقْرَارًا يَلْزَمُهُ وَاِنْ كَتَبَ الْخَطَّ

These specimens will suffice, as a general outline of the Moohummudan Law of pleadings and evidence, to show that its principles are consistent with equity and good sense. It will be seen that its rules are in unison with those of the most approved systems of jurisprudence, and that, that most equitable of all maxims "*melior est conditio defendentis*" receives its due consideration. Their preference of male to female evidence (which by the bye is not peculiar to this code*) and other irrational distinctions are, of course, not attended to in the practice of our Courts.

I shall conclude these remarks with a few observations on the Moohummudan Law of bailment; and first of that description of bailment which is termed deposit. This is defined to be the delivery of property to another for the purpose of preservation; which property becomes a trust in the hands of the bailee, who is not responsible in case of loss.† The reason of the rule in favour of depositaries

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عليه ان يشهدوا لهم حل اقرارا كان عليهم و قرأ الشهود يدى بين ولم يقره الشهود يدى بين كتب وان يقل لم او على اشهدوا قال سواء يشهدوا ان لهم يحل لا يعلموا لم وان يشهدوا ان لهم قال ولكن عليهم بما فيه و صحيفة الصراف والسمسار حجة عرفا فتاوى حمادى

* The testimony of women is always received when it is *necessary, i. e.* when the fact cannot be proved without them; and it is seldom admitted where other witnessess can be had.—Erskine's Principles of the Scottish Law, page 475.

† This definition nearly agrees with that of the Civil Law

الايداع تسليط الغير على حفظ ماله والوديعة ما يترك عند الامين

is thus given in the *Futawa-i-Hummadee.* His undertaking to preserve the property for the proprietor is a gratuitous act of kindness, which should not involve responsibility; and although the permitting a loss which can be avoided, certainly implies a deficiency of caution, yet, entire exemption from culpability is not necessary, in this instance, as it is in a contract mutually beneficial.* This however is the general rule, to which there are undoubtedly exceptions. A depositary cannot legally entrust the deposit to the care of a stranger. He should not retain it after the proprietor has required him to deliver it up. He should not fraudulently deny his pos-

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و هي امانة فلا يضمن بالهلاك في الكنز

Depositum est quod custodiendum alicui datum est.—Pandect. Justin. lib. xvi, tit. iii. culpæ autem nomine, id est desidiæ ae negagentiæ, non tenetur. Inst. lib. 3, tit. xv, §§ iii.

* والمعنى فيه ان المودع يتبرع في حفظها لصاحبها والتبرع لا يوجب ضمانا على المتبرع للمتبرع عليه و ان هلاكها في يد صاحبها و هو معنى قول الفقهاء يد المودع كيد المودع و يستوي ان هلك بما يمكن التحرز عنه او بما لا يمكن لان الهلاك بما يمكن التحرز منه بمعنى العيب في الحفظ و لكن صفة السلامة عن العيب انما يصير مستحقة في المعاوضة دون التبرع فتاوي حمادي

Consonat quod ait Ulpianus. Nunc videndum est quid veniat in commodati actionem; utrum dolus an et culpa, an vero et omne periculum. Et quidem in contractibus interdum dolum solum; interdum et culpam præstamus. Dolum in deposito: nam quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus; nisi forte et merces accessit.—Justin. Dig. lib. xiii, tit. vi, sec. 2, §§ xii.

session of it, or mix it with his own property so that it becomes undistinguishable, nor should he transgress his authority by making beneficial use of the property deposited.* In all these instances he will be responsible for any loss that may accrue. A depositary will also be considered guilty of transgression if, having been forbidden so to do, he carry the deposit on a journey, or if he unnecessarily take it to a place where danger may be apprehended; and, even though the proprietor may not have forbidden the removal of the deposit, if it be of such a nature as that its carriage would be attended with expence. In all these cases he is held responsible.†

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* لِلْمُودِعِ اِنْ يَحْفَظَهَا بِنَفْسِهِ و بِمَنْ فِي عِيَالِهِ فَاِنْ حَفَظَهَا بِغَيْرِهِمْ اَوْ اَوْدَعَهَا غَيْرَهُمْ ضَمِنَ هدايه فَاِنْ حَبَسَهَا بَعْدَ مَا طَلَبَ رَبُّهَا قَادِرًا عَلَى التَّسْلِيمِ اَوْ جَحَدَهَا مَعَهُ ثُمَّ اَقَرَّبِهَا اَوْلَا اَوْخَلَطَ بِمَا لِهِ حَتَّى لَا يَتَمَيَّزَ اَوْ تَعَدَّى فَلَبِسَ ثَوْبَهَا اَوْرَكِبَ وَا بَتَهَا اَو اَنْفَقَ بَعْضَهَا ثُمَّ خَلَطَ مِثْلَهُ بِمَا بَقِيَ ضَمِنَ شرح وقايه

These provisions nearly correspond with three of the six species of deceit enumerated in the Code of Justinian, " De variis speciebus doli ex quibus actio depositi nascitur. Prima species; si depositum non reddatur statim. Secunda; si reddatur res dolo depositarii deterior facta. Quinta: si dolo depositarius rem habere desierit. Lib. xvi, tit. 3, s. 2.

† وَلِلْمُودِعِ اَنْ يُسَافِرَ بِالْوَدِيْعَةِ وَ اِنْ كَانَ لَهُ مُؤْنَةُ حَمْلٍ فَهَذَ الَّذِيْ ذَكَرَهُ قَوْلُ اَبِي حنيفة رح سَوَاءٌ طَالَ الْخُرُوجُ اَوْ قَصُرَ و قَالَ محمد رح لَيْسَ لَهُ اَنْ يُسَافِرَ بِهَا فَاِنْ فَقَدَ ذَلِكَ ضَمِنَ طَالَ الْخُرُوجُ

Gross negligence also induces responsibility, but in order to ascertain what constitutes such negligence, the customs of the place at which the transaction occurred should be taken into consideration. For instance, the case was put of a depositary, who, having placed the deposit in the chamber of an inn, to which there was a common court-yard, went out, having fastened the door with a string, but not having locked it. In his absence the deposit was stolen. Here, in order to determine whether the depositary should or should not be responsible, it must be ascertained whether the mode of securing the door, which he adopted, was considered generally safe at the place, or whether it was usual to lock the door.*

أوْ قَصَّرَ وَ قَالَ ابُو يوسف رح اِنْ طَالَ الْخُرُوجُ كَمَا قَالَ محمد رح
ثُمَّ اسْتَثْني ابوحنيفة رح مسئلةً واحِدةً و هِيَ انَّ الوديعةَ لو كان
طَعَاماً كَثِيراً فَسافَرَ بِهَا فَهلكَ الطَّعامُ فَانَّهُ يَضمنُ اِسْتِحْسَانًا لانّهُ
يَحْتَمِلُ انْ يستغرِقَ قِيمةَ الطعامِ بِالْمؤنةِ و هَذَا كُلُّهُ اذَا كَانَ الطَّرِيقُ
آمِنًا امّا اِذَا كان مُخَوفًا يضمنُ الْوَدِيعَةَ فِي الفصُولِ كُلِّهَا وَ كَذَا اِذَا
كَانَ الطَّرِيقُ آمِنًا و نَهي صَاحِبُ الوديعةِ عنِ المسافرةِ فتاوي حمادي

* سُئِلَ عنْ مُودعٍ وضعَ الوَدِيعَةَ فِي حُجْرةٍ فِي خَانٍ و فيهِ صَحْن
لِاَقوام وَربَطَ سِلْسِلَةَ بَابِهَا بِحَبلٍ ولم يقفِلْهُ وخرج و سُرِقَتْ
الْوَدِيعَةُ هل يضمنُ فَقَالَ اِنْ عَدَّ سَدَّ هذه الربطِ مِثْلِ هَذَا الْمَوْضِعِ
تَوْثِيقًا لم يَضْمِنْ وَ اِنْ عَدَّ اغْفَالاً و اِهْمَالاً يَضْمِنُ فتاوي حمادي

The above rules are equally applicable to every description of bailee, with the exception of that relative to the removal of the property bailed, which does not apply strictly to carriers.

Hire or *locatio*, is, according to the Moohummudan Law, defined to be a contract of usufruct for a return.* "A contract of hire is not valid unless both the usufruct and the hire be particularly known and specified. Whatever is lawful as a price, is lawful also as a recompense in hire; because the recompense is a price paid for the usufruct, and is therefore analogous to the price of an article purchased. The extent of usufruct may be defined by fixing a term; as in the hire of a house for the purpose of residence, or the hire of land for the purpose of cultivation. A contract of hire, therefore, stipulated for a certain term, to whatever extent, is valid; because upon the term being known, the extent of the usufruct for that term is also known. Usufruct may also be ascertained by a specification of work, as where a person hires another to dye or sew cloth for him, or an animal for the purpose of carrying a certain burden, or of riding upon it a certain distance. Usufruct may also be ascertained by specification and pointed reference; as where a person hires another to carry such a particular load to such a particular place:" In these examples we find the three subdivisions of this bailment, as laid down by Sir Wm. Jones, the *locatio conductio rei;* the *locatio operis faciendi*

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* الاجارة عقد ترد على المنافع بعوض هدايه

Locatio conductio est contractus, quo de re fruendâ, vel faciendâ, pro certo precio convenit. Pand. Justin. lib. xix, tit. ii.

and the *locatio mercium vehendarum.* With respect to the first subdivision, I cannot find that the Moohummudan Law makes any distinction between the responsibility of an hirer and that of a borrower. But with respect to the two last, the distinction laid down by Sir Wm. Jones, that where skill is required, as well as care, in performing the work undertaken, the bailee for *hire* must be supposed to have engaged himself for a due application of the art, and the distinction between common carriers and other individuals seem to have been adopted also by the Moohummudan Law. Thus, if a thing perish in the hands of a common carrier, while performing his work, he is responsible; but not otherwise:* so also, if a taylor, in the exercise of his trade, spoil the cloth entrusted to him, he will be responsible for the value of it;† but if it be damaged or

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* الاجير المشترك ما هلك في يده من غير صنعه لا ضمان عليه عنده و لو هلك بصنعه كما لو هلك الثوب بدق القصار او الحرق فهو ضامن حماديه

† لو دفع الثوب الى القصار ليقصره غدا او الى ثلثة ايام و قبل القصار فاخر و لم يفرغ غدا او في ذلك الوقت فطالبه مرارا و لم يدفع حتى سرق لا يضمن حماديه من خلاصه

The first of these examples seems to coincide with the doctrine of Ulpian, as laid down in the Pandects, and the second to oppose it; "Si quis vitulos pascendos, vel sarciendum quid poliendum ve conduxit culpam eum præstare debere, at quod imperitiâ peccavit; culpam esse. Quippe ut artifex (inquit) conduxit." Lib. xix, de loc. con.

Si fullo vestimenta polienda acceperit, eaque mures roserint; ex

lost, not by means connected with the exercise of his trade, the taylor would not be held responsible; thus, for instance, though the cloth was stolen from his house, at a period subsequent even to the day on which he had engaged to redeliver it, no responsibility will attach to him.

"Actions against mandataries," Sir William Jones observes, "are indeed very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble *without compensation.*" This reason, I fear, loses none of its weight among the orientals, and I have not met with any provisions, in their law books, which suppose the possibility of such an undertaking.

On the subject of that species of bailment which is termed *commodatum* or loan for use, I do not find that there is much difference of opinion between the Moohummudan and the Roman or the English laws.* The definition given of it in the *Shurhi viqaya,* and in the Digest of Justinian is the same; except that, agreeably to the former law, I do not find that any slighter degree of negligence imposes greater responsibility on a borrower than on a hirer or a depositary.† If a person borrow an animal

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locato tenetur quia debuit ab hac re cavere. Et si pallium fullo permutaverit et alii alterius dederit; ex locato actione tenebitur etiamsi ignarus fecerit.

* اَلْعَارِيَةُ تَمْلِيْكُ الْمَنْفَعَةِ بِلاَ بَدَلٍ هدايه

Commodatum est contractus quo res gratis utenda datur ad tempus. Lib. xiii, tit. vi.

† اَلْعَارِيَةُ اَمَانَةٌ اِنْ هَلَكَتْ مِنْ غَيْرِ تَعَدٍّ لَمْ يَضْمِنْ

A loan is a trust, and if it perish without transgression (on the part of the borrower) he is not responsible.

from another, without any specification of time or place, or of the burthen which it is to carry, the borrower may take it wheresoever he pleases, and load it with whatever he thinks proper.

If the conjecture of Sir William Jones be correct, the Moohummudan Law agrees with the Mosaic in its provisions relative to the responsibility attached to a borrower, who is responsible in case of loss, should he at the time be out of sight of the thing borrowed.* For instance, if a person borrow a horse and enter a house, leaving the horse in the street so as to lose sight of it, and it be lost, the borrower will be responsible for its value.† This species of loan also is distinguished from the *mutuum* or loan for use;‡ in which species of bailment,

* "By the Law of Moses, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence*, or the *presence* of the owner: for, says the divine legislator, "if a man borrow aught of his neighbour, and it be hurt or die, *the owner thereof* not *being with it*, he shall surely make it good; but if the *owner* thereof be with it, he shall *not* make it good:" now it is by no means *certain*, that the original word signifies the *owner*, for it may signify the *possessor*, and the law *may* import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed."

† اذا ادخل المستعير الحمل بيتا و ترك الدابة المستعارة في السكة فهلكت فهو ضامن سواء ربطها او لم يربطها لما ذكرنا انه لما غيبها عن بصره فقد ضيعها فتاوى حمادي

‡ I call it after the French lawyers, *loan for use*, to distinguish it from this loan for consumption, or the *mutuum* of the Romans; by which is understood the lending of *money*, *wine*, *corn*, and other things that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity.—Law of Bailments.

according to the Moohummudan Law, also, the value of the loan must be restored, whatever accident may happen to the borrower; contrary to the case of a loan for use. *

A pledge is defined to be the giving a thing in security for the satisfaction of some right, such as a debt. † A pawnee may either ‡ watch over the pledge himself, or he may devolve the care of its preservation upon his wife, child, or servant, provided he be of his family. If, on the

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* The loan of *dirms* and *deenars*, and of articles estimated by *measurement of capacity*, by *weight*, or by *tale*, is considered in the light of *karz*.—The principle on which this proceeds is, that *Arecat* is an investiture with the use (of the property lent;) and as this cannot be obtained, with regard to these articles, without a destruction of the substance, it must, with respect to them, be necessarily considered as an investiture with the substance.—Now an investiture of this nature is to be considered in two lights, a gift or a loan.—*Hidaya.*

عارية الدراهم والدنانير والمكيل والموزون والمعدود قرض لان الاعارة تمليك المنافع ولا يمكن الانتفاع بها الا باستهلاك عينها فاقتضى تمليك العين ضرورة وذلك بالهبة او القرض والقرض ادناهما فيثبت هدايه

† الرهن جعل الشئ محبوسا بحق يمكن استيفاءه من الرهن كالديون هدايه

Pignus est jus creditori in re constitutum quo licet ei illum possidere in securitatem debiti; eamque distrahere, ut ex pretio debitum consequatur. Pand. Justin. lib. xx, De pignoribus, &c.

‡ للمرتهن ان يحفظ الرهن بنفسه وزوجته وولده وخادمه الذي في عياله وان حفظ بغير من في عياله او اودعه ضمن هدايه

contrary, he commit the care of it, or resign it in trust, to one who is not of his family, he becomes the security. "If a pawnee commit any transgression with respect to the pledge, he must make reparation to the whole amount of the value; in the same manner as in a case of usurpation; for the amount in which the value of the pledge exceeds the debt is a trust; and a transgression with respect to a trust, renders the person who commits it liable to make complete reparation.* A pledge is insured in the possession of the pawnee to whatever is the smallest amount the debt of the pawnee, or the value the pledge bore at the time of its being deposited. Thus, if a pledge, equivalent to the amount of the debt, perish in the pawnee's hands, his claim is rendered void, and he thereby, as it were, obtains a complete payment. If, on the contrary, the value of the pledge exceed the amount of the debt, the excess is in that case considered as a *trust*, and the whole of the pawnee's claim is annulled, on account of the decay of that part of the pledge which is equivalent to the amount thereof; and the remainder (the excess), as being held in trust, is not liable to be compensated for, and consequently the pawner sustains the loss of it. If, on the other hand, the value of the pledge be *less* than the debt, the pawnee forfeits that part of his claim only which is equal to the value of the pledge, and the balance, or excess, must be paid to him by the pawner."†

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* واذا تعدّى المرتهن في الرهن ضمنه ضمان الغصب لانّ الزيادة على مقدار الدين امانة و الامانات تضمن بالتعدّى هدايه

† الرهن مضمون باقلّ من قيمته ومن الدين فاذا هلك في

From the above observations it will be seen that simple depositaries and (by parity of reasoning) mandataries, are responsible only in case of transgression or gross negligence, the former consisting in disobeying the injunctions of the bailor; in unnecessarily exposing the property bailed to danger; in refusing to deliver up possession of it; in confiding the care of it to a stranger, or other overt acts of a similar nature which imply wilful wrong; the latter in that total deficiency of care, which amounts to gross negligence, and which must be judged of according to the circumstances of each case; that a borrower for use, and a hirer (regarding whom the law is the same), are responsible under similar circumstances, with this aditional provision, that,* in the case of hired or borrowed cattle, the bailee will be responsible, if, at the time of their being lost, they were out of his sight, this being *primâ facie* evidence of gross negligence; that persons hired to perform any work, or to carry goods from one place to another, will be responsible under similar circumstances, with this additional provision, that, in the case of professional workmen and common carriers, if damage or loss accrue to the property bailed, in the exercise of their vocation, it will be attributed to gross negligence; that a pawnee is answerable, under similar circumstances, for the whole value of the pledge; that if the pledge be lost by any means,† his debt is extin-

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يد المرتهن وقيمته والدين سواء صار المرتهن مستوفيا لدينه حكما
وان كانت قيمة الرهن اكثر فالفضل امانة وان كانت اقل سقط
من الدين بقدره ورجع المرتهن بالفضل هدايه

guished, if the property pawned equal or exceed it in value; and that a borrower for consumption is answerable at all events.

Now I cannot help being of opinion that the whole of this doctrine is consistent with reason and good sense. The law, as laid down by Sir Wm. Jones, is, that "a pawnee shall not be discharged, if the pawn be simply *stolen* from him, but if he be forcibly robbed of it, *without his fault*, his debt shall not be extinguished. He admits that this species of bailment is beneficial to the *pawnee* by securing the payment of his debt, and to the *pawner* by procuring him credit. In other words, the contract is mutually and reciprocally advantageous. Surely then the contracting parties ought each to be subjected to the same liabilities, and it ought to follow, as a necessary consequence, that if the borrower was robbed of the money, the pawnee should lose his debt. This, however, I do not find to be any where admitted. The reason of the rule in favour of the pawnee seems to be the same as that which is assigned for making a distinction between the borrower for use and the borrower for consumption, and rendering the latter liable in a case where the former is not; which is, that when money, and other things capable of valuation by number, weight, or measure, are lent for consumption, they are to be restored only in equal value or quantity; and these things, say the civilians, *nunquam pereunt*:* whereas, in loans for use, the arti-

* Ratio disparitatis est quod; qui rem utendam accipit ejus rei in specie debitor est: porro obligatio extinguitur rei debitæ interitu. At is qui nummum accepit non nummum quos accepit in specie debitor est, sed generis et quantitatis quæ nunquam pereunt.—Note to Pand. Justin. De actione commodati directâ.

cles are to be re-delivered specifically, and *therefore* the owner must abide the loss if they perish through inevitable accident. Now the argument seems rather more specious than solid. Would it not be more equitable, as the specific things cannot be re-delivered, to cause their value to be restored? By the opposite doctrine this apparent anomaly is introduced, that a borrower for use, who has the entire and exclusive benefit of the articles borrowed, shall not be responsible for an accident, which, occurring with a pawnor (who is only a participator with the pawnee in the benefit of the transaction) would render him answerable. Suppose the case of a man who, having five pieces of money which (as being the gift of a relation, or from any other cause) he is unwilling to exchange, were to borrow five pieces from another individual and to leave his own five with the lender in pledge, and both the pawnor and pawnee were to be robbed of the money borrowed and the money pledged in the same night, does it not appear rather hard that the pawnor (who perhaps derived the least benefit from the transaction) should be subjected to the entire loss? The following case has been cited by Sir Wm. Jones; "*Zaid* had left with *Amru* divers goods in pledge for a certain sum of money, and some *ruffians* having entered the house of Amru took away his own goods together with those pawned by Zaid. And the question was, whether, *since the debt became extinct by the loss of the pledge*, and since the goods pawned exceeded in value the amount of the debt, *Zaid* could legally demand the balance of Amru. To which question the great law officer of the Othman court answered, with the brevity usual on such occasions, Olmaz, it cannot be." Upon this Sir Wm. Jones observes, "we must necessarily suppose that the Turks

are wholly unacquainted with the imperial laws of Byzantium, and that their own rules are repugnant to natural justice.' Now it is, obviously, to the question that the objection is made, and not to the answer, which is indubitably right, as far as it goes. But where is the repugnancy to natural justice in declaring the debt to be extinct on the loss of the pledge? Would it not be more repugnant to justice to make the borrower pay a debt for which he had already given more than ample satisfaction? And where is the hardship sustained by the lender? According to the doctrine contained in the law of bailments, if the lender had retained his money, and had derived no benefit from putting it out to interest on good security, he would have suffered *damnum absque injuriâ;* but having derived such benefit, he can come upon the borrower, who derived only equal, perhaps not so great benefit from the transaction. This would indeed be inconsistent, and, in my humble judgment, not easily reconcileable with natural justice.* I should apprehend

* I find the following passage in the law of bailments, "It may be right also to mention that the distinction before taken, in regard to *loans*, between an obligation to restore the *specific* things, and a power or necessity of returning *others equal in value*, holds good likewise in the contracts of *hiring* and *depositing*: in the first case it is a regular *bailment*, in the second it becomes a *debt*. Thus, according to Alfenus in his famous law, on which the judicious Bynkershoek has learnedly commented, If an ingot of silver be delivered to a silversmith to make an urn, the *whole* property is transferred, and the employer is only a *creditor* of metal equally valuable, which the workman engages to *pay* in a certain shape: the smith may consequently apply it to his own use; but if it perish, even by unavoidable mischance or irresistible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time: It would be otherwise, no doubt, if the *same* silver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner,

it is not the usage in Turkey, as Sir Wm. Jones conjectures, to stipulate that "*amissio pignoris liberet debitorem*" such stipulation being expressly declared by the Moohummudan Law, null and void.*

As I undertook to furnish a brief outline of the Moohummudan law of bailments I could not have omitted that part of it which relates to pawnees. The doctrine in question militates with that laid down in the law of bailments as expounded by Sir Wm. Jones, and it is therefore not without considerable reluctance that I have treated of the subject; but my fondness (which I am not

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were agreed to be specifically re-delivered in the form of a cup or a standish." Now I must confess that I am dull enough not to see the justice of this law. It is true, that if the specific thing perish it cannot be restored, but where is the reason why the value of it should not be made good. The loss to the bailor is equal, perhaps greater, when the thing bailed is to be returned specifically; and the culpability, if any, on the part of the bailee, is, in either case, the same.

* اتفق الراهن والمرتهن على ان الرهن ان ضاع ضاع بغير شيي لم يكن كذلك ويضيع بالدين ولو رهن عند انسان شيا فقال المرتهن للراهن اخذته على انه ان ضاع ضاع بغير شيي فقال نعم الرهن جايز والشرط باطل حماديه من الفتاوى السراجية

A pawnor and pawnee agree that if the pledge be lost, its loss shall not be attended with any responsibility; it shall not be so, but the debt becomes extinguished also. If a person give a thing in pledge to another, and the pawnee say to the pawnor; I receive this thing on condition that, if it be lost, the loss shall not be attended with responsibility; and the pawnee assent, the pledge is allowable, but the condition is void. *Futawa-i-Hummadee.*

ashamed to avow) for the *Moosulmaun* Law, induced me to become its humble advocate in the present instance.

In compiling the principles of law contained in this work, I have had recourse to none but the most approved authorities, and I have appended to this work extracts from the original Arabic, to vouch for the accuracy of the doctrines I have laid down.* I have taken care to note any material difference of opinion which I have discovered in these authorities. The precedents consist of legal expositions, which have been actually delivered in the several courts of justice. I have selected such as appeared to me of the greatest importance, and those which seemed to embrace doctrinal points most likely to recur. With a view to retain the sense, as far as practicable, I have left them in the original shape of question and reply ; and none have been admitted but such as appeared to me

* I should observe, however, that I purposely avoided consulting books in the first instance, and this I did with a view of avoiding technicalities as much as possible, and where my own knowledge or memory of the law failed me, I generally had recourse to living authorities, referring to books only for the purpose of verification. This will of course occasion considerable dissimilarity in the letter of the rules as they appear in the original and in my compilation, but their spirit I trust has been uniformly preserved. Another cause of dissimilarity is, that some of the principles here laid down are founded on the absence rather than the existence of rules. For instance, I have laid it down as a principle that there is no distinction between real and personal, nor between ancestrel and acquired property in the Moohummudan law of inheritance, and this is deduced from the invariable use in the original Arabic of the word تركه which includes all descriptions of property. The same observation is applicable to the doctrine laid down respecting primogeniture and a few other instances. I have moreover taken the liberty of introducing what I considered more apposite examples on the doctrine of successions, whenever I conceived that an improvement might be made to the illustrations adduced in the *Sirajya* or *Shureefeea*.

(assisted by all the legal talent I could procure) to admit of no doubt as to their accuracy.

By hazarding some of the preceding observations I am aware that, I may have subjected myself to the rigour of criticism, and, if inflicted, I shall have no reason perhaps to complain. My only defence is, that the active occupations of an official life in India leave but little leisure for literary research; that to cultivate the fields of science, or to mature the fruits of reflection, undisturbed retirement is necessary; and that no more than superficial knowledge and crude conceptions, on any subject unconnected with his immediate profession, can be expected from a man of ordinary capacity, whose time is perpetually absorbed in the dry and distracting details of ministerial duty.

I have no presentiment of fear, however, as to the reception which the following pages will meet with from the liberality and indulgence of the judicial officers for whose benefit they were chiefly intended; and if this book should prove the means of averting one atom of wrong from those who sue for justice, or one moment of anxiety from those who dispense the laws, I shall not consider unprofitable the time that has been occupied, and the labour that has been exerted.

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PRINCIPLES

OF

Moohummudan Law

RELATIVE TO

INHERITANCE, CONTRACTS, AND MISCELLANEOUS SUBJECTS.



CHAPTER I.

PRINCIPLES OF INHERITANCE.

SECTION I.

General Rules.

1. THERE is no distinction between real and personal, nor between ancestrel and acquired property, in the Moohummudan Law of Inheritance.

Property of all kinds inheritable without distinction.

2. Primogeniture confers no superior right. All the sons, whatever their number, inherit equally.

Of Primogeniture.

3. The share of a daughter is half the share of a son, whenever they inherit together.

Of the right of a daughter, with a son.

4. A will made in favour of one son, or of one heir, cannot take effect to the prejudice and without the consent of the other sons, or the other heirs.

Of legacies in favour of heirs.

5. Debts are claimable before legacies, and legacies (which however cannot exceed one-third of the testator's estate) must be paid before the inheritance is distributed.

Of debts and legacies.

6. Slavery, homicide, difference of religion and difference of allegiance, exclude from inheritance.

Causes of exclusion from inheritance.

7. But persons not professing the Moohummudan faith may be heirs to those of their own persuasion, and

Exceptions.

in the case of persons who are of the Moohummudan faith, difference of allegiance does not exclude from inheritance.

Simultaneous succession of a plurality of heirs.

8. To the estate of a deceased person, a plurality of persons having different relations to the deceased, may succeed simultaneously, according to their respectively allotted shares, and inheritance may partly ascend lineally, and partly descend lineally at the same time.

No right by representation.

9. The son of a person deceased shall not represent such person if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance, if he have a paternal uncle. For instance, A, B and C are grandfather, father and son. The father B dies in the life-time of the grandfather A. In this case the son C shall not take *jure representationis*, but the estate will go to the other sons of A.

Sons, son's sons &c. have no specific allotments; but their portions vary according to the number of the other heirs.

10. Sons, son's sons and their lineal descendants, in how low a degree soever, have no specific share assigned to them: the general rule is that they take all the property after the legal sharers are satisfied, unless there are daughters; in which case each daughter takes a share equal to half of what is taken by each son. For instance, where there are a father, a mother, a husband, a wife and daughters, but little remains as the portion of the sons; but where there are no legal sharers nor daughters, the sons take the whole property.

Enumeration of heirs not liable to exclusion.

11. Parents, children, husband and wife must, in all cases, get shares, whatever may be the number or degree of the other heirs.

General Rule for the shares

12. It is a general rule that a brother shall take double the share of a sister. The exception to it is in

the case of brothers and sisters by the same mother only, but by different fathers. of brothers and sisters.

13. The portions of those who are legal sharers only, and not residuary heirs, can be stated determinately, but the portions receivable by those who are both sharers and residuaries cannot be stated generally, and must be adjusted with reference to each particular case. For instance, in the case of a husband and wife, who are sharers only, their portion of the inheritance is fixed for all cases that can occur; but in the case of daughters and sisters who are, under some circumstances, legal sharers, and under others residuaries, and in the case of fathers and grandfathers who are, under some circumstances, legal sharers only, and under others, residuaries also, the extent of their portions depends entirely upon the degree of relation of the other heirs and their number.*

Of sharers who are not residuary heirs.

Of sharers who are residuary heirs.

SECTION II.

Of Sharers and Residuaries.

14. The widow takes an eighth of her husband's estate, where there are children or son's children, how low soever, and a fourth where there are none. Share of the widow.

15. The husband takes a fourth of his wife's estate, where there are children or son's children, how low soever, and a moiety where there are none. Share of the husband.

16. Where there is no son and there is only one daughter, she takes a moiety of the property as her legal share. Share of the daughter.

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* Daughters without sons are legal sharers, and so are sisters without brothers, but with them they become merely residuaries. Grandfathers and fathers with sons, son's sons, &c. are legal sharers, but, with daughters only, they are residuaries, as well as legal sharers.

Share of two or more daughters.

17. Where there is no son, and there are two or more daughters, they take two-thirds of the property as their legal share.

Share of the son's daughters.

18. Where there is no son, nor daughter, nor son's son, the son's daughters take as the daughters, namely, a moiety is the legal share of one, and two-thirds of two or more.

Of the same.

19. Where there is one daughter, the son's daughters take a sixth, but where there are two or more daughters they take nothing.

Of the same.

20. Where there is a son's son, however, or a son's grandson, the son's daughters take a share equal to half of what is allotted to the grandson or great grandson.

Of brothers and sisters.

21. Brothers and sisters can never take any share of the property, where there is a son or son's son, how low soever, or a father or grandfather.*

Of the same.

22. Where there are uterine brothers, the sisters each take a share equal to half of what is taken by the brothers; and they being then residuaries, the amount of their shares varies according to circumstances.

Of the same.

23. In default of sons, son's sons, daughters and son's daughters, where there is only one sister and no uterine brother, she takes a moiety of the property.

Of the same.

24. In default of sons, son's sons, daughters and son's daughters, where there are two or more sisters and no uterine brother, they take two-thirds of the property.

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* It is the orthodox opinion that the grandfather excludes brethren of the whole blood and those by the same father only. Among the Schias, who adhere to the doctrine of the two disciples, the contrary opinion is maintained. The terms "grandfather" and "grandmother" are intended to include all ancestors, in whatever degree of ascent, between whom and the deceased no female intervenes.

25. Where there are daughters or son's daughters and no brothers, the sisters take what remains after the daughters or son's daughters have realized their shares: such residue being half, should there be only one daughter or son's daughter, and one-third should there be two or more.

Of the same.

26. A distinction is made between the two descriptions of half brothers and half sisters. Half brothers and half sisters, who are by the same father only, can never inherit a half brother's estate while there are both brothers and sisters by the same father and mother, but those by the same mother only, do inherit with brethren of the whole blood.

Of half brothers and half sisters. Of those by the same father only. Of those by the same mother only.

27. Where there is only one sister by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take one-sixth as their legal shares.

Of half sisters by the same father only.

28. Where there are two or more sisters by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take nothing.

Of the same.

29. Where however the half sisters by the same father only, have an uterine brother, they each take a share equal to half of what is allotted to him.

Of the same.

30. Among brothers and sisters by the same mother only, difference of sex makes no distinction in the amount of the shares, contrary to the case of brothers and sisters by the same father and mother, and brothers and sisters by the same father only; but the general rule of a double share to the male applies to their issue.

Brothers and sisters by the same mother only inherit equally; but the general rule of a double share for the male applies to their issue.

31. Where there is one brother by the same mother only, or one sister by the same mother only, his or her

Of a half brother and a

half sister by the same mother.

share is one-sixth, provided there are no children of the deceased nor son's children, nor father, nor grandfather, and where there are two or more children by the same mother only, their share is one-third.

Of two or more.

Of the father.

32. Where there is a son of the deceased, or son's son, how low soever, the father will take one-sixth.

Of the mother.

33. Where there are children, or son's children, how low soever, or two or more brothers and sisters, the mother will take one-sixth.

Of the same.

34. Where there are no children, nor son's children, and only one brother or sister, the mother will take one-third with a widow or a widower, if she have a grandfather to share with instead of a father; but a third of the remainder only, after the shares of the widow or widower have been satisfied, if there be a father to share with her.

Of the grandfather.

35. Grandfathers can never take any share of the property where there is a father.

Share of.

36. Where there is a son of the deceased or son's son, how low soever, and no father, the grandfather will take one-sixth.

Of the grandmother.

37. Grandmothers can never take any share of the property where there is a mother, nor can paternal grandmothers inherit where there is a father.

Of paternal female ancestors.

38. Paternal female ancestors of whatever degree of ascent are also excluded by the grandfather, except the father's mother; she not being related through the grandfather.

Exception.

Share of grandmothers.

39. The share of a maternal grandmother is one-sixth, and the same share belongs to the paternal grandmother where there is no father.

40. Two or three grandmothers being of equal degree, share the sixth equally.

Of two or more grand-mothers.

41. But grandmothers who are nearer in degree to the deceased, exclude those who are more distant.

The nearer exclude the more distant.

42. A maternal grandfather and the mother of a maternal grandfather are not entitled to any specific share, they being termed false ancestors, and not included in the number of sharers or residuaries.

Of false ancestors.

SECTION III.

Of distant kindred.

43. Where there is no son, nor daughter, nor son's son, nor son's daughter, however low in descent, nor father, nor grandfather, nor other lineal male ancestor, nor mother, nor mother's mother, nor father's mother, nor other lineal female ancestor, nor widow, nor husband, nor brother of the half or whole blood, nor sons, how low soever, of the brethren of the whole blood or of those by the same father only, nor sister of the half or whole blood, nor paternal uncle, nor paternal uncle's son, how low soever, (all of whom are termed either sharers or residuaries),* the daughter's children and the children of the son's daughters succeed; and they are termed the first class of distant kindred.

Of the first class of distant kindred.

44. In default of all those above enumerated, the grandfathers and grandmothers of that description, who

Of the second class.

* Of the persons here enumerated the following males are legal sharers, namely, the father, the grandfather or other lineal male ancestor, the husband and the brother of the half blood by the same mother only, and the following females, namely the daughter, the son's daughter, the widow, the mother, the grandmother, the sister by the same father and mother, the sister by the father only and the sister by the same mother only. The shares of these persons vary according to circumstances, and in particular instances some of them (as has been shown) are liable to exclusion altogether. The rest of the persons enumerated are residuaries only, and have no specific shares.

are neither sharers nor residuàries, succeed; and they are termed the second class of distant kindred.

Of the third class.

45. In their default the sister's children, and the brother's daughters, and the sons of the brothers by the same mother only, succeed; and they are termed the third class of distant kindred.

Of the fourth class.

46. In their default the paternal aunts and uncles by the same mother only, and maternal uncles and aunts succeed; and they are termed the fourth class of distant kindred.

Of their children.

47. In their default the cousins, that is, the children of paternal aunts and uncles by the same mother only, and of maternal uncles and aunts succeed.

Exception in the case of an enfranchised slave.

48. There is an exception to the above general rules, relative to the succession of distant kindred after residuaries. If the estate to be inherited belonged to an enfranchised slave, his manumittor and the heirs of such manumittor inherit, in preference to the distant kindred of the deceased.

Rules for the succession of the first class.

49. The rule with regard to the succession of the first class of distant kindred is, that they take according to proximity of degree, and when equal, those who claim through an heir have a preference to those who claim through one not being an heir. For instance, the daughter of a son's daughter and the son of a daughter's daughter are equidistant in degree from the ancestor; but the former shall be preferred, by reason of the son's daughter being an heir, and the daughter's daughter not being an heir: if there should be a number of these descendants of equal degree, and all on the same footing with respect to the persons through whom they claim, but the sexes of the ancestors differ in any

stage of ascent the distribution will be made with reference to such difference of sex; regard being had to the stage at which the difference first appeared: for instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of a daughter's daughter's daughter; because one of the ancestors of the former was a male, whose portion is double that of a female.*

For the succession of the second class.

50. The succession also, with regard to the second class of distant kindred, is regulated nearly in the same manner, by proximity, and by the condition and sex of the person through whom the succession is claimed when the claimants are related on the same side; when the sides of relation differ, two-thirds go to the paternal, and one to the maternal side, without regard to the sex of the claimants.†

For the succession of the third class.

51. The same rules apply with regard to the third as to the first class of distant kindred; for instance, the brother's son's daughter and the sister's daughter's son are equidistant in degree from the ancestor; but the former shall be preferred by reason of the brother's son being a residuary heir, and where they are equal in this respect the rule laid down for the first class is applicable to this.

* The opinion of Aboo Yoosuf is that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants and not to the sexes of their ancestors. But this, although the most simple, is not the most approved rule.

† The rule may be thus exemplified. The claimants being a maternal grandfather and the mother of a maternal grandfather, the former being more proximate excludes the latter; but suppose them to be the father of a maternal grandfather and the mother of a maternal grandfather: here the claimants are equal in point of proximity; the side of their relation is the same and they are equal with respect to the sex of the person through whom they claim, and in this case the only method of making the distribution is by having regard to the sexes of the claimants and by giving a double share to the male.

For the succession of the fourth class.

52. With regard to the fourth class all that need be said is, that (the sides of relation being equal) uncles and aunts of the whole blood are preferred to those of the half, and those who are connected by the same father only are preferred to those by the same mother only. Where the strength of relation is also equal, as, for instance, where the claimants are a maternal uncle and a maternal aunt, of the whole blood, then the rule is, that the male shall have a share double that of the female. Where however one claimant is related through the father only, and the other is related through the mother only, the claimant related through the father shall exclude the other if the sides of their relation are the same; for instance, a maternal aunt by the same father only, will exclude a maternal aunt by the same mother only; but if the sides of their relation differ; for instance if one of the claimants be a paternal aunt by the same father and mother, and the other be a maternal aunt by the same father only, no exclusive preference is given to the former, though she obtains two shares in virtue of her paternal relation.

For the succession of their children.

53. The succession of the children of the above class, that is, the cousins, is regulated by the following rules:—propinquity to the ancestor is the first rule. Where that is equal, the claimant through an heir inherits before the claimant through one not being an heir, without respect to the sex of the claimants; for instance, the daughter of a paternal uncle succeeds in preference to the son of a paternal aunt—unless the aunt is related on both the father's and mother's sides, and the relation of the uncle be by the same mother only. But where the son of a paternal aunt by the same father and mother, and the son of a maternal aunt by the same father and mother, or by the same father only, claim together, the latter will not be excluded by the former; the only

difference is, that two-thirds are the right of the claimant on the paternal side, and one-third that of the claimant on the maternal side. Should there be no difference between the strength of relation, the sides or the sexes of the persons through whom they claim, regard must be had to the sexes of the claimants themselves.

For the succession of the descendants of their children.

54. In the distribution among the descendants of this class, the same rule is applicable as to the descendants of the first class; for instance, the two daughters of the daughter of a paternal uncle's son will get twice as much as the two sons of the daughter of a paternal uncle's daughter, supposing the relation of the uncles to be the same, and in case of equality in all other respects regard must be had as above, to the sexes of the claimants.*

Of those who succeed in default of distant kindred.

55. In default of distant kindred, he has a right to succeed whom the deceased ancestor acknowledged conditionally, or unconditionally, as his kinsman: provided the acknowledgment was never retracted, and provided it cannot be established that the person in whose favour the acknowledgment was made belongs to a different family.

* In considering the doctrine of succession of distant kindred attention must be paid to the following points. First, their relative distance in degree of relation from the deceased, whether a greater or lesser number of degrees removed. Secondly, it must be ascertained whether any of the claimants are the children of heirs. If so preference must be shown to such children; Thirdly their strength of relation, whether they are of the half or whole blood; Fourthly their sides of relation whether connected by the father's or mother's side; and Fifthly, the sexes of the persons through whom they claim, whether male or female. With respect to this latter point however a difference of opinion exists; it being maintained by some authorities that *cæteris paribus* no regard should be had to the mere sex of the person through whom the claim is made, but that the adjustment should be made according to the sex of the claimants themselves. But the contrary is the more approved doctrine. It should be recollected too, that, whenever the sides of relation differ, those connected through the father are entitled to twice as much as those connected through the mother, whatever may be the sexes of the claimants.

Of the Public Treasury.

56. In default of all these, there being no Will, the property will escheat to the Public Treasury; but this only where no individual has the slightest claim.

SECTION IV.

Primary Rules of Distribution.

Rule where the shares are a half and a fourth.

57. Where there are two claimants, the share of one of whom is half, and of the other a fourth, the division must be made by four; as in the case of a husband and an only daughter, the property is made into four parts, of which the former takes one and the latter two. The remaining fourth will revert to the daughter.

A half and an eighth.

58. Where there are two claimants, the share of one of whom is half, and of the other an eighth, the division must be made by eight; as in the case of a wife and a daughter, the property is made into eight parts, of which the daughter takes four and the wife one. The surplus three shares revert to the daughter.

A half, a fourth and an eighth cannot occur together.

59. No case can occur of two claimants, the one entitled to a fourth and the other to an eighth; nor of three claimants, the one entitled to half, the other to a fourth, and the third to an eighth.

A sixth and a third.

60. Where there are two claimants, the share of one of whom is one-sixth, and of the other one-third; as in the case of a mother and father being the only claimants, the property is made into six parts of which the mother takes two and the father one as his legal share. The surplus three shares revert to the father.

A sixth and two-thirds.

61. Where there are two claimants, the share of one of whom is one-sixth, and of the other two-thirds; as in the case of a father and two daughters being the only claimants, the property is made into six parts, of which

the father takes one as his legal share, and the two daughters four. The surplus share reverts to the father.

62. Where there are two claimants, the share of one of whom is one-third, and of the other two-thirds; as in the case of a mother and two sisters, the property is made into three parts, of which the mother takes one and the two sisters two.

A third and two-thirds.

63. No case can occur of three claimants, the one entitled to one-sixth, the other to one-third, and the other to two-thirds.

A sixth a third and two-thirds cannot occur together.

64. Where a husband inherits from his childless wife, (his share in this case being one-half), and there are other claimants entitled to a sixth, a third, or two-thirds, such as a father, a mother, or two sisters, the division must be by six.

A half with a sixth a third or two-thirds.

65. Where a husband inherits from his wife who leaves children, or a wife from her childless husband (the shares of these persons respectively in these cases being one-fourth), and there are other claimants entitled to one-sixth, one-third, or two-thirds, the division must be by twelve.

A fourth with a sixth, a third or two-thirds.

66. Where a wife inherits from her husband, leaving children, her share in that case being one-eighth, and there are other claimants entitled to one-sixth, one-third, or two-thirds, the division must be by twenty-four.

An eighth with a sixth a third or two-thirds.

67. Where six is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction, it may be increased to seven, eight, nine, or ten.

Of the encrease of six.

Of twelve.

68. Where twelve is the number, and it does not suit, it may be increased to thirteen, fifteen, or seventeen.

Of twenty-four.

69. Where twenty-four is the number, and it does not suit, it may be increased to twenty-seven.

SECTION V.

Rules of distribution among numerous claimants.

Equal numbers.

70. Numbers are said to be *mootumasil,* or equal, where they exactly agree.

Concordant.

71. They are said to be *mootudakhil,* or concordant, where the one number being multiplied, exactly measures the other.

Composit.

72. They are said to be *mootuwafiq,* or composit, where a third number measures them both.

Prime.

73. They are said to be *mootubayun,* or prime, where no third number measures them both.

Principles of distribution.

74. There are seven rules of distribution, the first three of which depend upon a comparison between the number of the heirs and the number of the shares; and the four remaining ones upon a comparison of the numbers of the different sets of heirs, after a comparison of the number of each set of heirs with their respective shares.

First principle.

75. The first is when, on a comparison of the number of the heirs and the number of shares, it appears that they exactly agree, there is no occasion for any arithmetical process. Thus, where the heirs are a father, a mother, and two daughters, the share of the parents is one-sixth each, and that of the daughters two-thirds. Here, according to principle 61, the division must be

by six; of which each parent takes one, and the remaining four go to the two daughters.

76. The second is when, on a comparison of the number of the heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that some third number measures them both, when they are termed *mootuwafiq*, or composit; as in the case of a father, a mother, and ten daughters. Here according to principle 61, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the ten daughters, which cannot be done without a fraction; and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be composit, or agree in two. In this case the rule is, that half the number of such heirs, which is 5, must be multiplied into the number of the original division 6: thus $5 \times 6 = 30$; of which the parents take ten or five each, and the daughters twenty or two each.

Second principle.

77. The third is when, on a comparison of the number of the heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that there is one over and above between the number of such heirs, and the number of shares remaining for them. This is termed *mootubayun*, or prime, as in the case of a father, a mother, and five daughters. Here also according to principle 61 above quoted, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the five daughters, which cannot be done without a fraction, and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to

Third principle.

be *mootubayun*, or prime. In this case the rule is, that the whole number of such heirs, which is five, must be multiplied into the number of the original division. Thus $5 \times 6 = 30$; of which the parents take ten or five each, and the daughters twenty or four each.

Fourth principle.

78. The fourth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that all the sets are *mootumasil*, or equal, as in the case of six daughters, three grandmothers, and three paternal uncles; in which case according to principle 61, the division must be by six. Here in the first instance, a comparison must be made between the several sets and their respective shares. The share of the daughters is two-thirds, but two-thirds of six is 4, and 4 compared with the number of daughters 6, is *mootuwafiq*, or composit, agreeing in two. The share of the three grandmothers is one-sixth, but one-sixth of six is 1, and 1 compared with the number of grandmothers is *mootubayun*, or prime. The remaining share which is one, will devolve on the three paternal uncles; but one compared with three is also *mootubayun*, or prime.

Then the rule is, that the sets of heirs themselves must be compared with each other, by the whole where it appears that they were *mootudakhil*, or concordant; or *mootubayun*, or prime; and by the measure where it appears that they were *mootuwafiq*, or composit, and if agreeing in two by half. In the instance of the daughters, the result of the former comparison was, that they agreed in two; consequently the half of their number must be compared with the whole number of the grandmothers and of the uncles, in whose cases the comparison showed a prime result. Thus $3 = 3$ and $3 = 3$, which being *mootumasil*, or equal, the rule is, that one of the numbers be multiplied into the number of the original

division. Thus $3 \times 6 = 18$, of which the daughters will take (two-thirds) twelve, or two each; the grandmothers will take (a sixth) three, or one each, and the paternal uncles will take the remaining three or one each.

79. The fifth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that the sets are *mootudakhil*, or concordant; as in the case of four wives, 3 grandmothers, and 12 paternal uncles. In this case, according to principle 65, the division must be by twelve.

Fifth principle.

Here in the first instance, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is one-fourth; but the fourth of twelve is 3, and 3 compared with the number of wives is *mootubayun*, or prime. The share of the three grandmothers is one-sixth; but the sixth of twelve is 2, and 2 compared with the number of grandmothers is also prime. The remaining shares, which are seven, will devolve on the twelve paternal uncles; but 7 compared with 12 is also prime.

Then the rule is, that the sets of heirs themselves must be compared, the whole of each with the whole of each, as the preceding results show that they are prime, on a comparison of the several heirs with their respective shares. Thus $4 \times 3 = 12$, and $3 \times 4 = 12$, which being concordant, the one number measuring the other exactly, the rule is, that the greater number must be multiplied in to the number of the original division. Thus $12 \times 12 = 144$; of which the wives will get (one-fourth) thirty-six, or nine each, the grandmothers (a sixth) twenty-four, or eight each, and the paternal uncles the remaining eighty-four, or seven each.

80. The sixth is when, on a comparison of the different sets of heirs, it appears that one or more sets

Sixth principle.

cannot get their portions without a fraction, and that some of the sets are *mootuwafiq,* or composit, with each other; as in the case of four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles; in which case, according to principle 66, the original division must be by 24. Here in the first place, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is an eighth; but an eighth of 24 is 3, and three compared with the number of wives is *mootubayun,* or prime. The share of the eighteen daughters is two-thirds; but two-thirds of 24 is 16, and 16 compared with the number of daughters 18, is composit, and they agree in 2. The share of the fifteen female ancestors is one-sixth; but a sixth of 24 is 4, and 4 compared with the number of female ancestors 15, is prime. The remaining share, which is one, will devolve on the six paternal uncles as residuaries; but one and six are prime.

Then the rule is, that the sets of heirs themselves must be compared; by the whole where the preceding result shows that they were prime, and by their measure, where it shows that they were composit. Thus $4\times2=9-1$, which being prime, the one number must be multiplied by the other. This result must then be compared with the whole of the third set; because the preceding result shows that set to have been prime. Thus $15\times2=36-6$ and $6=15-9$ and $6=9-3$, which agreeing in 3, the third of one number, must be multiplied into the whole of the other. This result must also be compared with the whole of the fourth set; because the preceding result shows that set to have been prime. Thus $6\times30=180$, which being concordant, or agreeing in six, the sixth of one number must be multiplied into the whole of the other, but as it is obvious that by this process the result would still be the same, multiplication is needless. Then this result must be multiplied into

the number of the original division. Thus $180\times24=4320$, of which the four wives will get an eighth, five hundred and forty, or one hundred and thirty-five each; the eighteen daughters two-thirds, two thousand eight hundred and eighty, or one hundred and sixty each; the female ancestors one-sixth, seven hundred and twenty, or forty-eight each; and the paternal uncles the remaining one hundred and eighty, or thirty each.

81. The seventh and last is when, on a comparison of the different sets of heirs, it appears that all the sets are *mootubayun*, or prime, and no one of them agrees with the other; as in the case of two wives, six female ancestors, ten daughters, and seven paternal uncles. Here according to principle 66, the original division must be by 24.

Seventh principle.

In the first instance, a comparison must be made between the several sets of heirs and their respective shares. Thus the share of the two wives is one-eighth; but the eighth of 24 is 3, and 3 compared with the number of wives is prime. The share of the six female ancestors is one-sixth; but the sixth of 24 is 4, and 4 compared with the number of female ancestors, is composit, or agrees in two. The share of the ten daughters is two-thirds; and two-thirds of 24 is 16, and 16 compared with the number of daughters is also composit, or agrees in two. The remaining share, which is one, will devolve on the seven paternal uncles; but 1 and 7 are prime.

Then the rule is, that the sets of heirs themselves must be compared; by the whole where the preceding result shows that they were prime, and by the half or other measure, where it shows that they were composit. Agreeably to this rule the whole of the first set of heirs must be compared with half of the second: thus $2=3-1$, which numbers being prime must be multiplied

into each other. Then the result must be compared with the half of the next set, the former result here also having agreed in 2. Thus 5=6−1, which being prime, must be multiplied into each other. Then the result must be compared with the whole of the next set, the former result here having been prime. Thus 7×4=30−2×3=7−1, which being also prime, must be multiplied into each other. Thus 30×7=210, in which case the rule is, that this last product must be multiplied into the number of the original division. Thus 210×24=5040, of which the wives will take an eighth, six hundred and thirty, or three hundred and fifteen each; the female ancestors a sixth, eight hundred and forty, or one hundred and forty each; the daughters two-thirds, three thousand three hundred and sixty, or three hundred and thirty-six each; and the paternal uncles the remaining two hundred and ten, or thirty each.

Rule for ascertaining the shares of different sets of heirs.

82. When the whole number of shares, into which an estate should be made, has been found, the mode of ascertaining the number of portions to which each set of heirs is entitled, is to multiply the portions originally assigned them, by the same number by which the aggregate of the original portions was multiplied; as an easy example of which rule the following case may be mentioned. There are a widow, eight daughters, and four paternal uncles; the shares of the two first sets being one-eighth and two-thirds, the estate, according to principle 66, must be made originally into 24 parts, of which the widow is entitled to 3, the daughters to 16, and there remain 5 to be divided among the four paternal uncles, but which cannot be done without a fraction. Here the proportion between the shares and the heirs who cannot get their portions without a fraction, must be ascertained, and 4=5−1, being prime, the rule is, (see No. 77,) to multiply the number of the original division

by the whole number of the heirs so situated. Thus $24 \times 4 = 96$. Here to find the shares of each set multiply what each was originally declared entitled to, by the number by which the aggregate of all the original portions was multiplied. Thus $3 \times 4 = 12$, the share of the widow; $16 \times 4 = 64$, the share of the daughters; and $5 \times 4 = 20$, the share of the paternal uncles.

Rule for ascertaining the shares of each individual of the different sets of heirs.

83. To find the portion of each individual in the several sets of heirs, ascertain how many times the number of persons in each set may be multiplied into the number of shares ultimately assigned to each set. Thus $8 \times 8 = 64$, and $5 \times 4 = 20$. Here eight will be the share of each daughter, and four the share of each paternal uncle, which, with the twelve which formed the share of the widow, will make up the required number ninety-six.

SECTION VI.

Of exclusion from and partial surrender of Inheritance.

Two descriptions of exclusion.

84. Exclusion is either entire or partial. By entire exclusion is meant, the total privation of right to inherit. By partial exclusion is meant, a diminution of the portion to which the heir would otherwise be entitled. Entire exclusion is brought about by some of the personal disqualifications enumerated in principle (6), or by the intervention of an heir, in default of whom a claimant would have been entitled to take, but by reason of whose intervention he has no right of inheritance.

Explanation of

In what case an entirely excluded heir partially excludes others.

85. Those who are entirely excluded by reason of personal disqualification, do not exclude other heirs, either entirely or partially; but those who are excluded by reason of some intervening heir, do in some instances partially exclude others.

Example.

86. For instance, a man dies, leaving a father, a mother, and two sisters, who are infidels. Here the mother will get her third, notwithstanding the existence of the two infidel sisters, who are excluded by reason of their personal disqualification; but had they not been infidels, she would only have been entitled to a sixth, although the sisters, who partially exclude her, are themselves entirely excluded by reason of the intervention of the father.

Rules where one of the heirs makes a partial surrender of his right.

87. If one of the heirs choose to surrender his portion of the inheritance for a consideration, still he must be included in the division. Thus in the case of there being a husband, a mother, and a paternal uncle, the shares are one-half and one-third. Here according to principle 64, the property must be made into six shares; of which the husband was entitled to three, the mother to two, and the paternal uncle, as a residuary, to the remaining one. Now supposing the estate left to amount to six lacks of Rupees, and the husband to content himself with two, still as far as affects the mother, the division must be made as if he had been a party and of the remaining four lacks the mother must get two; otherwise, were he not made a party, the mother would get only one-third of four, instead of one-third of six lacks as her legal share, and the remainder would go to the uncle as residuary.

SECTION VII.

Of the increase.

Definition of the increase.

§. 88. The increase is where there are a certain number of legal sharers, each of whom is entitled to a specific portion, and it is found, on a distribution of the shares into which it is necessary to make the estate, that there is not a sufficient number to satisfy the just demands of all the claimants.

89. It takes effect in three cases; either when the estate should be made into six shares; or when it should be made into twelve, or when it should be made into twenty-four. See principles (67, 68, 69). One example will suffice:

Cases in which it takes effect.

90. A woman leaves a husband, a daughter, and both parents. Here the property should be made into twelve parts, of which, after the husband has taken his fourth or three, and the parents have taken their two-sixths or four, there remain only five shares for the daughter, instead of six, or the moiety to which by Law she is entitled. In this case the number twelve, into which it was necessary to make the estate, must be increased to thirteen, with a view of enabling the daughter to realize six shares of the property.

Example of.

SECTION VIII.

Of the Return.

91 The return is where there being no residuaries, the surplus, after the distribution of the shares, returns to the sharers, and the doctrine of it is as follows:

Definition of the return.

92. It takes effect in four cases; first, where there is only one class of sharers unassociated with those not entitled to claim the return, as in the instance of two daughters, or two sisters; in which case the surplus must be made into as many shares as there are sharers, and distributed among them equally.

Circumstances under which it takes effect.

First case example of.

93. Secondly, where there are two or more classes of sharers, unassociated with those not entitled to claim the return, as in the instance of a mother and two daughters; in which case the surplus must be made into as many shares as may correspond with the shares of inheritance to which the parties are entitled, and dis-

Second case example of.

tributed accordingly. Thus the mother's share being one-sixth, and the two daughter's share two-thirds, the surplus must be made into six, of which the mother will take two and the daughters four.

Third case example of.

94. Thirdly, when there is only one class of sharers, associated with those not entitled to claim the return, as in the instance of three daughters and a husband; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently, with giving the person excluded from the return his share of the inheritance, (which is in this case four), and the husband will take one as his legal share or a fourth, the remaining three going to the daughters as their legal shares and as the return; but if it cannot be so distributed without a fraction, as in the case of a husband and six daughters, (three not being capable of division among six), the proportion must be ascertained between the shares and sharers. Thus $3\times 2=6$, which agreeing in three, the rule is, that the number 4, into which the estate was intended to be distributed, must be multiplied by 2, that is, the measure or a third of the number of those entitled to the return. Thus $4\times 2=8$, of which the husband will take two, and the daughters six or one each; and if on a comparison as above, the result should be prime, as in the case of a husband and five daughters, the number 4, into which it was intended to distribute the estate, must be multiplied by 5, or the whole of the number of those entitled to a return. Thus $4\times 5=20$, of which the husband will take five, and the daughters fifteen or three each.

Fourth case example of.

95. Fourthly, where there are two or more classes of sharers, associated with those not entitled to claim the return, as in the instance of a widow, four paternal

grandmothers, and six sisters by the same mother only; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently with giving the person excluded from the return her share of the inheritance, (which is in this case four). Then, after the widow has taken her share, there remain three to be divided among the grandmothers and half sisters; but the share of the grandmothers is one-sixth, and of the half sisters one-third, and here, to give them their portions, the remainder should be made into six: but a third and a sixth of this number, amount to three, which agrees with the number to be divided among them; of which the half sisters will take two, and the grandmothers one. Had there been only one grandmother, and only two half sisters, there would have been no necessity for any further process, as the grandmother would have taken one-third, and the two half sisters the other two-thirds. But it is obvious, that two shares cannot be distributed among the six half sisters nor one among the four paternal grandmothers without a fraction. To find the number into which the remainder should be made, recourse must be had to the seventh principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $2 \times 3 = 6$, which being composit or agreeing in two, and $1 \times 3 = 4 - 1$, which being prime, the whole of one set of sharers must be compared with the half of the other. Thus $3 = 4 - 1$, which also being prime, one of the numbers must be multiplied by the other. Thus $3 \times 4 = 12$; and having found this number it must be multiplied into that of the original division. Thus $4 \times 12 = 48$, of which the grandmothers will get 12 or three each, 12 being to 48 as 1 to 4, and the half sisters 24 or 4 each, 24 being to 48 as 2 to 4, and the widow will take the remaining twelve. It is different if the shares of the persons entitled to a return, do not agree

with the number left for them, after deducting the share of the person not entitled to a return, as in the case of a widow, nine daughters, and six paternal grandmothers. Here the property must in the first instance be made into eight shares, being the smallest number of which it is susceptible, consistently with giving the widow her share. Then, after the widow has taken her share, there remain seven to be divided among the daughters and the grandmothers; but the share of the grandmothers is one-sixth, and of the daughters two-thirds; and here to give them their portions the property divisible among them should be made into six parts; but a sixth and two-thirds of this number amount to 5, which disagrees with the number to be divided among them; in which case the rule is, that the number of shares of those entitled to a return, must be multiplied by the number into which it was necessary to make the property originally. Thus $8 \times 5 = 40$, of which the widow will take 5, the daughters will take 28, and the grandmothers 7. But it is obvious, that 28 cannot be distributed among the nine daughters, nor 7 among the six paternal grandmothers, without a fraction. To find the number into which the remainder should be distributed, recourse should be had to the sixth principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $9 \times 3 = 28 - 1$, and $6 = 7 - 1$, both of which being prime, the whole of one set of sharers must be compared with the whole of the other set. Thus $6 = 9 - 3$, which being concordant or agreeing in 3, the rule is, that the third of one of the numbers must be multiplied into the whole of the other. Thus $3 \times 6 = 18$; and having found this number, it must be multiplied into that of the preceding result. Thus $40 \times 18 = 720$, of which the daughters will get 504 or 56 each, 504 being to 720 as 28 to 40; the grandmothers will get 126 or 21 each, 126 being to 720 as 7 to 40; and the widow will get the remaining ninety.

SECTION IX.

Of vested inheritances.

96. Where a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the survivors are said to have vested interests in the inheritance; in which case the rule is, that the property of the first deceased must be apportioned among his several heirs living at the time of his death, and it must be supposed that they received their respective shares accordingly.

Definition of vested inheritances.

Rules in case of.

97. The same process must be observed with reference to the property of the second deceased, with this difference, that the proportion must be ascertained between the number of shares to which the second deceased was entitled at the first distribution, and the number into which it is requisite to distribute his estate to satisfy all the heirs.

Ditto.

98. If the proportion should appear to be prime, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the whole number of the shares into which it is necessary to make the estate, at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the number of shares to which the deceased was entitled at the preceding one.

Ditto.

99. If the proportion should be concordant, or composit, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the measure of the number of shares into which it is necessary to make the estate at the subsequent distribution, and the individual shares at the subsequent distri-

Ditto.

bution must be multiplied by the measure of the number of shares to which the deceased was entitled at the preceding distribution.

Example of

100. For instance, a man dies leaving A, his wife, B and C, his two sons, and D and E, his two daughters; of whom A and D died before the distribution, the former leaving a mother, and the latter a husband.

At the first distribution the estate should be made into forty-eight shares, of which the widow will get six, the sons fourteen each, and the daughters seven each. On the death of the widow, leaving a mother and the above four children, her estate should, in the first instance, be made into thirty-six parts, of which the mother is entitled to six, the sons to ten each, and the daughters to five each; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make the estate. Thus $6 \times 6 = 36$, which proving concordant, or agreeing in six, the rule is, that the aggregate and individual shares of the preceding distribution be multiplied by six, or the measure of the number of shares into which it is necessary to make the estate at the second distribution. Thus $48 \times 6 = 288$, and $14 \times 6 = 84$, and $7 \times 6 = 42$; but the measure of the number to which the deceased was entitled at the preceding distribution being only one, it is needless to multiply by it the shares at the second distribution. On the death of one of the daughters, leaving her two brothers, her sister, and a husband, her estate should, in the first instance, be made into ten parts, of which her husband is entitled to five, her brothers to two each, and her sister to one; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to

which she was entitled at the preceding distribution, and the number into which it is necessary to make her estate. But she derived forty-seven shares from the preceding distributions, (five at the second and forty-two at the first). Thus $10 \times 4 = 47 - 7$, and $7 = 10 - 3$, and $3 = 7 - 4$, and $3 = 4 - 1$, which proving prime or agreeing in a unit only, the rule is, that the aggregate and individual shares of the preceding distributions be multiplied by ten, or the whole number of shares into which it is necessary to make the estate at the third distribution. Thus $288 \times 10 = 2880$, and $84 \times 10 = 840$, and $42 \times 10 = 420$, and $6 \times 10 = 60$, and $10 \times 10 = 100$, and $5 \times 10 = 50$. Then the shares at the third distribution should be multiplied by the number of shares to which the deceased sister was entitled at the preceding distributions. Thus $5 \times 47 = 235$, and $2 \times 47 = 94$, and $1 \times 47 = 47$. Therefore of the 2880 shares, the son B will get $840 + 100 + 94 = 1034$; the son C $840 + 100 + 94 = 1034$; the daughter E $420 + 50 + 47 = 517$; the mother of A 60, and the husband of D 235.

SECTION X.

Of missing persons and posthumous children.

101. The property of a missing person is kept in abeyance for ninety years. His estate in this interval cannot derive any accession from the intermediate death of others, nor can any person who dies during this interval inherit from him. *Of missing persons.*

102. If a missing person be a coheir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. *Of a missing person being a coheir with others.*

In this case the daughters will take half the estate immediately, as that must be their share at all events; but the grandchildren will not take any thing, as they are precluded on the supposition of their father's being alive.

Of a child in the womb, there being sons.

103. Where a person dies leaving his wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born.

Of a child in the womb, there being heirs who would succeed only on its default.

104. Where a person dies leaving his wife pregnant, and he has no sons, but there are other relatives who would succeed in the event only of his having no child, (as would be the case, for instance, with a brother or sister), no immediate distribution of the property takes place.

Of the same there being heirs who would take at all events.

105. But if those other relatives would succeed at all events to some portion, (larger without than with a child, as would be the case, for instance, with a mother) the property will be distributed, and the mother will obtain a sixth, the share to which she is necessarily entitled, and afterwards, if the child be not born alive, her portion will be augmented to one-third.

SECTION XI.

De Commorientibus.

Rule of succession where two or more individuals meet with a sudden death at the same time.

106. Where two or more persons meet with a sudden death about the same time, and it is not known which died first, it will be presumed according to one opinion, that the youngest survived longest; but according to the more accurate and prevailing doctrine, it will be presumed that the death of the whole party was simultaneous, and the property left will be distributed among the surviving heirs, as if the intermediate heirs who died

at the same time with the original proprietor had never existed.*

SECTION XII.

Of the distribution of assets.

107. What has preceded relates to the ascertainment of the shares to which the several heirs are *entitled*; but when the proper number of shares into which an estate should be made, may have been ascertained, it seldom happens that the assets of the estate exactly tally with such number; in other words, if it be found that the estate should be made into ten, or into fifty shares, it would seldom happen that the assets exactly amount in value to ten or fifty goldmohurs or rupees. To ascertain the proper shares of the different sets of heirs and creditors in such cases, the following rules are laid down:

Of claims and assets.

108. When the number of shares has been found into which the estate should be divided, and the number of shares to which each set of heirs is entitled, the former number must be compared with the number of the assets. If these numbers appear to be prime to each other, the rule is, that the share of each set of heirs must be

Rules for apportioning them.

* The following case may be cited as an example of this rule. A, B and C are grandfather, father and son. A and B perish at sea, without any particulars of their fate being known. In this case, if A have other sons, C will not inherit any of his property, because the law recognizes no right by representation, and sons excludes grandsons. Mr. Christian in a note to Blackstone's Commentaries (vol. 2. page 516) notices a curious question that was agitated some time ago, where it was contended that when a parent and child perish together, and the priority of their deaths is unknown, it was a rule of the civil law to presume that the child survives the parent. He proceeds however to say "But I should be inclined to think that our courts would require more than presumptive evidence to support a claim of this nature. Some curious cases *de commorientibus* may be seen in *causes celebres* 3 *tom* 412 et seq. in one of which where a father and son were slain together in battle and on the same day the daughter became a professed nun, it was determined that her civil death was prior to the death of her father and brother, and that the brother, having arrived at the age of puberty, should be presumed to have survived his father."

multiplied into the number of the assets, and the result divided by the number of shares into which it was found necessary to make the estate. For instance, a man dies, leaving a widow, two daughters, and a paternal uncle, and property to the amount of 25 rupees. In this case, the estate should be originally divided into 24, of which the widow is entitled to 3, the daughters to 16, and the uncle to 5. Now to ascertain what shares of the estate left, these heirs are entitled to, the above rule must be observed. Thus $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$; but $75 \div 24 = 3\frac{3}{24}$, and $400 \div 24 = 16\frac{16}{24}$, and $125 \div 24 = 5\frac{5}{24}$.

Where the numbers are prime.

Ditto where they are composit.

109. If the numbers are composit, the rule is that the share of each set of heirs must be multiplied into the measure of the number of the assets and the result divided by the measure of the number of shares into which it was found necessary to make the estate. For instance, a man dies, leaving the same number of heirs as above and property to the amount of 50 rupess. Now as 24 and 50 agree in 2 the measure of both numbers is half. Thus $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$, but $75 \div 12 = 6\frac{3}{12}$, and $400 \div 12 = 33\frac{4}{12}$, and $125 \div 12 = 10\frac{5}{12}$.

And of individual heirs.

110. If it be desired to ascertain the number of shares of the assets to which each individual heir is entitled, the same process must be resorted to, with this difference, that the number of the assets must be compared with the share originally allotted to each individual heir, and the multiplication and division proceeded on as above. For instance, in the above case the original share of each daughter was 8, and $8 \times 25 = 200$, and $200 \div 12 = 16\frac{8}{12}$.

And of creditors.

111. In a distribution of assets among creditors the rule is, that the aggregate sum of their debts must be

the number into which it is necessary to make the estate, and the sum of each creditor's claim must be considered as his share. For instance, supposing the debt of one creditor to amount to 16 rupees, of another to 5, and of another to 3, and the debtor to have left property to the amount of 21 rupees. By observing the same process as that laid down in principle (109), it will be found that the creditor to whom the debt of 16 rupees was due, is entitled to 14 rupees, the creditor of 5 rupees to 4 rupees 6 annas, and the creditor of 3 rupees to 2 rupees 10 annas.

SECTION XII.

Of Partition.

112. Where two persons claim partition of an estate which has devolved on them by inheritance, it should be granted; and so also where one heir claims it, provided the property admit of separation without detriment to its utility.

Property where conveniently partible should be distributed among the heirs at the desire of one or more.

113. But where the property cannot be separated without detriment to its several parts, the consent of all the coheirs is requisite; so also where the estate consists of articles of different species.

In other cases the distribution should not take place without the consent of all.

114. On the occasion of a partition, the property (where it does not consist of money) should be distributed into several distinct shares, corresponding with the portions of the coheirs; each share should be appraised, and then recourse should be had to drawing of lots.

Mode of distribution.

115. Another common method of partition is by usufruct, where each heir enjoys the use or the profits of the property by rotation; but this method is subordinate to actual partition and where one coheir demands separation, and the other a division of the usufruct only, the former claim is entitled to preference in all practicable cases.

Of partition by usufruct.

CHAPTER II.

OF INHERITANCE ACCORDING TO THE IMAMEEYA, OR SCHIA DOCTRINE.

Three sources of the right of Inheritance.

1. According to the tenets of this Sect, the right of inheritance proceeds from three different sources.

Enumeration of them.

2. First, it accrues by virtue of consanguinity. Secondly, by virtue of marriage. Thirdly, by virtue of Willa.*

Heirs by consanguinity consist of three degrees.

3. There are three degrees of heirs who succeed by virtue of consanguinity; and so long as there is any one of the first degree, even though a female, none of the second degree can inherit; and so long as there is any one of the second degree, none of the third can inherit.

Enumeration of heirs of the first degree.

4. The first degree comprises the parents, and the children, and grandchildren, how low in descent soever, the nearer of whom exclude the more distant. Both parents, or one of them inherit together with a child, a grandchild, or a greatgrandchild; but a grandchild does not inherit together with a child, nor a greatgrandchild together with a grandchild.

Their relative rights.

Subdivision of.

5. This degree is divided into two classes; the roots which are limited, and the branches which are unlimited. The former are the parents who are not represented by their parents; the latter are the children who are repre-

* In a note to his translation of the Hedaya, Mr. Hamilton observes, that " there is no single word in our language, fully expressive of this term. The shortest definition of it is, " the relation between the master (or patron) and his Freedman." but even this does not express the whole meaning." Had he proceeded to state " and the relation between two persons who had made a reciprocal testamentary contract," the definition might have been more complete.

sented by their children. An individual of one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other in proportion to their proximity.

6. No claimant has a title to inherit with children, but the parents, or the husband and wife.

Of coheirs with children.

7. The children of sons take the portions of sons, and the children of daughters take the portions of daughters, however low in descent.

Of the sons' and daughters' offspring.

8. The second degree comprises the grandfather, and grandmother, and other ancestors, and brothers, and sisters, and their descendants, however low in descent, the nearer of whom exclude the more distant. The greatgrandfather cannot inherit together with a grandfather or a grandmother; and the son of a brother cannot inherit with a brother or a sister; and the grandson of a brother cannot inherit with the son of a brother, or with the son of a sister.

Of the second degree.

Their relative rights.

9. This degree again is divided into two classes; the grand-parents and other ancestors, and the brethren and their descendants. Both these classes are unlimited, and their representatives in the ascending and descending line, may be extended *ad infinitum*. An individual of the one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other, in proportion to their proximity.

Subdivision of.

10. The third degree comprises the paternal and maternal uncles and aunts and their descendants, the nearer of whom exclude the more distant. The son of a

Of the third degree.

Their relative rights.

paternal uncle cannot inherit with a paternal uncle, or a paternal aunt, nor the son of a maternal uncle with a maternal uncle, or a maternal aunt.

Additional rules.

11. This degree is unlimited in the ascending and descending line, and their representatives may be extended *ad infinitum*; but so long as there is a single aunt or uncle of the whole blood, the descendants of such persons cannot inherit. Uncles and aunts all share together; except some be of the half and others of the whole blood. A paternal uncle by the same father only, is excluded by a paternal uncle by the same father and mother; and the son of a paternal uncle by the whole blood excludes a paternal uncle of the half blood.

Enumeration of other heirs, of the third degree.

12. In default of all the heirs above enumerated, the paternal and maternal uncles and aunts of the father and mother succeed; and in their default their descendants, to the remotest generation, according to their degree of proximity to the deceased. In default of all those heirs, the paternal and maternal uncles and aunts of the grandparents and greatgrandparents inherit, according to their degree of proximity to the deceased.*

General rule relative to the half and whole blood.

Exception.

13. It is a general rule that the individuals of the whole blood exclude those of the half blood, who are of the same rank; but this rule does not apply to individuals of different ranks. For instance, a brother or sister of the whole blood excludes a brother or sister of the half

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* There seems to be some similarity between the order of succession here laid down, and that prescribed in the English Law for taking out Letters of administration: " In the first place the children, or on failure of the children, the parents of the deceased, are entitled to the administration; both which indeed are in the first degree; but with us the children are allowed the preference. Then follow brothers, grandfathers, uncles or nephews, (and the females of each class respectively), and lastly, cousins. The half blood is admitted to the administration as well as the whole, for they are of the kindred of the Intestate." *Blackstone's Commentaries*, vol. 2 Page 504.

blood: a son of the brother of the whole blood, however, does not exclude a brother of the half blood, because they belong to different ranks: but he would exclude the son of a half brother who is of the same rank; so also an uncle of the whole blood does not exclude a brother of the half blood, though he does an uncle of the half blood.

Example.

14. The principle of the whole blood excluding the half blood, is confined also to the same rank, among collaterals: for instance, generally a nephew or niece whose father was of the whole blood, does not exclude his or her uncle or aunt of the half blood; except in the case of there being a son of a paternal uncle of the whole blood, and a paternal uncle of the half blood by the same father only, the latter of whom is excluded by the former.

Additional rules.

Exception.

15. This principle of exclusion does not extend to uncles and aunts being of different sides of relation to the deceased; for instance, a paternal uncle or aunt of the whole blood, does not exclude a maternal uncle or aunt of the half blood; but a paternal uncle or aunt of the whole blood, excludes a paternal uncle or aunt of the half blood, and so likewise a maternal uncle or aunt of the whole blood, excludes a maternal uncle or aunt of the half blood.

Additional rule where the sides of relation differ.

And where they are the same.

16. If a man leave a paternal uncle of the half blood, and a maternal aunt of the whole blood, the former will take two-thirds, in virtue of his claiming through the father, and the latter one-third, in virtue of her claiming through the mother; as the property would have been divided between the parents in that proportion, had they been the claimants instead of the uncle and aunt.

Additional rule where the sides differ.

Further exception relative to the exclusion of the half blood.

17. The general rule, that those related by the same father and mother, exclude those who are related by the same mother only does not operate in the case of individuals to whom a legal share has been assigned.

Of uterine and half sisters.

18. If a man leave a whole sister, and a sister by the same mother only, the former will take half the estate and the latter one sixth, the remainder reverting to the whole sister; and if there be more than one sister by the same mother only, they will take one-third, and the remaining two-thirds will go to the whole sister.

Rule in case of a double relation.

19. Where there are two heirs, one of whom stands in a double relation: for instance, if a man die leaving a maternal uncle, and a paternal uncle who is also his maternal uncle* the former will take one-third, and the latter two-thirds, and he will be further entitled to take one half of the third which devolved on the maternal uncle; and thus he will succeed altogether to five-sixths, leaving the other but one-sixth.

Of claimants by marriage.

20. Secondly, those who succeed in virtue of marriage are the husband and wife, who can never be excluded in any possible case; and their shares are half for the husband, and a fourth for the wife, where there are no children, and a fourth for the husband, and an eighth for the wife, where there are children.

Of the succession of husband and wife.

21. Where a wife dies, leaving no other heir, her whole property devolves on her husband; and where a husband

* The relation of paternal and maternal uncle may exist in the same person in the following manner: A having a son C by another wife, marries B having a son D by another husband. Then C and D intermarry and have issue, a son E, and A and B have a son F. Thus F is both the paternal and maternal uncle of E. So likewise if a person have a half brother by the same father, and a half sister by the same mother, who intermarry, he will necessarily be the paternal and maternal uncle of their issue.

dies, leaving no other heir but his wife, she is only entitled to one-fourth of his property, and the remaining three-fourths will escheat to the public treasury.

22. If a sick man marry and die of that sickness, without having consummated the marriage, his wife shall not inherit his estate; nor shall he inherit if his wife die before him, under such circumstances. But if a sick woman marry, and her husband die before her, she shall inherit of him, though the marriage was never consummated, and though she never recovered from that sickness.

Rule in case of marriage not consummated.

23. If a man on his deathbed divorce his wife, she shall inherit, provided he died of that sickness within one year from the period of divorce; but not if he lived for upwards of a year.

Rule in case of divorce on deathbed.

24. In case of a reversible divorce, if the husband die within the period of the wife's probation, or if she die within that period, they have a mutual right to inherit each other's property.

And of reversible divorce.

25. The wife by an usufructuary, or temporary marriage, has no title to inherit.*

And of irregular marriage.

26. Thirdly, those who succeed in virtue of *Willa;* but they never can inherit so long as there is any claimant by consanguinity or marriage.

Of claimants by *willa.*

27. *Willa* is of two descriptions; that which is derived from manumission, where the emancipator by such act derives a right of inheritance; and that which de-

Two descriptions of.

* This species of contracts is reprobated by the orthodox sect, and they are both considered wholly illegal. See Hamilton's Hedaya, vol. 1, pages 71 and 72.

pends on mutual compact, where two persons reciprocally engage, each to be heir of the other.

The first preferred.

28. Claimants under the latter title are excluded by claimants under the former.

General rules of exclusion.

29. The general rules of exclusion, according to this sect, are similar to those contained in the orthodox doctrine; except that they make no distinction between male and female relations. Thus a daughter excludes a son's son, and a maternal uncle excludes a paternal granduncle; whereas according to the orthodox doctrine in such cases, the daughter would only get half, and the maternal uncle would be wholly excluded by the paternal uncle of the father.

Difference of allegiance does not exclude, nor homicide, unless wilful.

30. Difference of allegiance is no bar to inheritance, and homicide, whether justifiable or accidental, does not operate to exclude from the inheritance. The homicide, to disqualify, must have been of *malice prepense.*

The doctrine of the increase not admitted.

31. The legal number of shares into which it is necessary to make the property, cannot be increased if found insufficient to satisfy all the heirs without a fraction. In such case, a proportionate deduction will be made from the portion of such heir as may, under certain circumstances, be deprived of a legal share, or from any heir whose share admits of diminution. For instance, in the case of a husband, a daughter and parents. Here the property must be divided into twelve, of which the husband is entitled to three or a fourth; the parents to two-sixths or four, and the daughter to half; but there only remain five shares for her instead of six, or the moiety to which she is entitled. In this case, according to the orthodox doctrine, the property would have been made into thirteen parts to give the

Example.

daughter her six shares; but according to the *Imameeya* tenets, the daughter must be content with the five shares that remain, because in certain cases her right as a legal sharer, is liable to extinction; for instance, had there been a son, the daughter would not have been entitled to any specific share, and she would become a residuary; whereas the husband or parents can never be deprived of a legal share, under any circumstances.

Of the return.

32. Where the assets exceed the number of heirs the surplus reverts to the heirs. The husband is entitled to share in the return; but not the wife. The mother also is not entitled to share in the return, if there are brethren; and where there is any individual possessing a double relation, the surplus reverts exclusively to such individual.

primogeniture.

33. On a distribution of the estate, the elder son if he be worthy, is entitled to his father's sword, his Koran, his wearing apparel and his ring.*

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* In the foregoing summary I am not aware that I have omitted any point of material importance. The legal shares allotted to the several heirs are of course the same as those prescribed in the Soonee Code, both having the precepts of the Koran as their guide. The rules of distribution and of ascertaining the relative shares of the different claimants are also (*mutatis mutandis*) the same. It is not worth while to notice in this compilation the doctrines of the *Imameeya* sect on the law of contracts or their tenets in miscellaneous matters. A Digest of their laws, relative to those subjects, was some time ago prepared and a considerable part of it translated by an eminent Orientalist (Colonel John Baillie) by whom however it was left unfinished; probably from an opinion that the utility of the undertaking might not be commensurate to the time and labour employed upon it.

CHAPTER III.

OF SALE.

Definition of sale. 1. Sale is defined to be a mutual and voluntary exchange of property for property.

How effected. 2. A contract of sale may be effected by the express agreement of the parties, or by reciprocal delivery.

Four kinds of. 3. Sale is of four kinds; consisting of commutation of goods for goods: of money for money: of money for goods: and of goods for money; which last is the most ordinary species of this kind of contract.

Four denominations of. 4. Sales are either absolute, or conditional, or imperfect, or void.

Of an absolute sale. 5. An absolute sale is that which takes effect immediately; there being no legal impediment.

Of a conditional sale. 6. A conditional sale is that which is suspended on the consent of the proprietor, or (where he is a minor) on the consent of his guardian, in which there is no legal impediment, and no condition requisite to its completion but such consent.

Of an imperfect sale. 7. An imperfect sale is that which takes effect on seizin; the legal defect being cured by such seizin.

Of a void sale. 8. A void sale is that which can never take effect; in which the articles opposed to each other, or one of them, not bearing any legal value the contract is nude.

Of the consideration. 9. The consideration may consist of whatever articles, bearing a legal value, the seller and purchaser may agree upon; and property may be sold for prime cost, or for more, or for less than prime cost.

10. It is requisite that there should be two parties to every contract of sale, except where the seller and purchaser employ the same agent, or where a father or a guardian makes a sale on behalf of a minor, or where a slave purchases his own freedom by permission of his master.

Of the parties.

11. It is sufficient that the parties have a sense of the obligation they contract, and a minor, with the consent of his guardian, or a lunatic in his lucid intervals, may be contracting parties.

Who may contract.

12. In a commutation of goods for goods, or of money for money, it is illegal to stipulate for a future period of delivery; but in a commutation of money for goods or of goods for money, such stipulation is authorized.

Postponing payment illegal.

Exception.

13. It is essential to the validity of every contract of sale, that the subject of it and the consideration should be so determinate as to admit of no future contention regarding the meaning of the contracting parties.

Certainty requisite.

14. It is also essential that the subject of the contract should be in actual existence at the period of making the contract, or that it should be susceptible of delivery, either immediately or at some future definite period.

Other requisite conditions.

15. In a commutation of money for money, or of goods for goods, if the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition.

Equality when requisite.

16. It is unlawful to stipulate for any extraneous condition, involving an advantage to either party, or any uncertainty which might lead to future litigation; but

Illegal conditions.

Exception.

if the extraneous condition be actually performed, or the uncertainty removed, the contract will stand good.

Of option.

17. It is lawful to stipulate for an option of dissolving the contract; but the term stipulated should not exceed three days.

Payment how determinable.

18. When payment is deferred to a future period, it must be determinate and cannot be suspended on an event, the time of the occurrence of which is uncertain, though its occurrence be inevitable. For instance, it is not lawful to suspend payment until the wind shall blow, or until it shall rain, nor is it lawful, even though the uncertainty be so inconsiderable as almost to amount to a fixed term; for instance, it is not lawful to suspend payment until the sowing or reaping time.

Sale of a debt.

19. It is not lawful to sell property in exchange for a debt due from a third person, though it is for a debt due from the seller.

Resale of personal property.

20. A resale of personal property cannot be made by the purchaser until the property shall actually have come into his possession.

Warranty implied.

21. A warranty as to freedom from defect and blemish, is implied in every contract of sale.

Where the property differs from the description.

22. Where the property sold differs, either with respect to quantity or quality from what the seller had described it, the purchaser is at liberty to recede from the contract.

Sale of land.

23. By the sale of land nothing thereon, which is of a transitory nature, passes. Thus the fruit on a tree belongs to the seller, though the tree itself, being a fixture, appertains to the purchaser of the land.

24. Where an option of dissolving the contract has been stipulated by the purchaser, and the property sold is injured or destroyed in his possession, he is responsible for the *price*, agreed upon; but where the stipulation was on the part of the seller, the purchaser is responsible for the *value* only of the property.

Responsibility in case of option.

25. But the condition of option is annulled by the purchaser's, exercising any act of ownership, such as to take the property out of *statu quo*.

Option how annulled.

26. Where the property has not been seen by the purchaser, nor a sample, (where a sample suffices), he is at liberty to recede from the contract, provided he may not have exercised any act of ownership; if upon seeing the property it does not suit his expectation, even though no option may have been stipulated.

Option to purchasers of unseen property.

Exception.

27. But though the property have not been seen by the seller, he is not at liberty to recede from the contract (except in a sale of goods for goods) where no option was stipulated.

No option to sellers.

Exception.

28. A purchaser who may not have agreed to take the property with all its faults, is at liberty to return it to the seller on the discovery of a defect, of which he was not aware at the time of the purchase, unless while in the hands of the purchaser it received a further blemish; in which case he is only entitled to compensation.

Option on discovering a defect.

Exception.

29. But if the purchaser have sold such faulty article to a third person, he cannot exact compensation from the original seller; unless, by having made an addition to the article prior to the sale, he was precluded from returning it to the original seller.

Rule in case of resale.

Exception.

Cases in which restitution may be demanded.

30. In a case where articles are sold, and are found on examination to be faulty, complete restitution of the price may be demanded from the seller, even though they have been destroyed in the act of trial, if the purchaser had not derived any benefit from them; but if the purchaser had made beneficial use of the faulty articles, he is only entitled to proportional compensation.

And compensation only.

The first purchaser is on a footing with the second.

31. If a person sell an article which he had purchased, and be compelled to receive back such article and to refund the purchase money, he is entitled to the same remedy against the original seller, if the defect be of an inherent nature.

Proviso.

Remedy against the seller how lost.

32. If a purchaser, after becoming aware of a defect in the article purchased, make use of the article or attempt to remove the defect, he shall have no remedy against the seller, (unless there may have been some special clause in the contract); such act on his part implying acquiescence.

General rules for the right of restitution.

33. It is a general rule, that if the articles sold are of such a nature as not easily to admit of separation or division without injury, and part of them, subsequently to the purchase, be discovered to be defective, or to be the property of a third person, it is not competent to the purchaser to keep a part and to return a part, demanding a proportional restitution of the price for the part returned. In this case he must either keep the whole, demanding compensation for the proportion that is defective, or he must return the whole, demanding complete restitution of the price. It is otherwise where the several parts may be separated without injury.

And that of compensation.

Illegal practices.

34. The practices of forestalling, regrating, and engrossing, and of selling on Friday, after the hour of prayer, are all prohibited, though they are valid.

CHAPTER IV.

OF *SHOOFAA*, OR PRE-EMPTION.

1. *Shoofaa*, or the right of Pre-emption, is defined to be a power of possessing property which has been sold, by paying a sum equal to that paid by the purchaser. Definition of pre-emption.

2. The right of pre-emption takes effect with regard to property sold, or parted with by some means equivalent to sale, but not with regard to property the possession of which has been transferred by gift, or by will, or by inheritance; unless the gift was made for a consideration, and the consideration was expressly stipulated; but pre-emption cannot be claimed where the donor has received a consideration for his gift, such consideration not having been expressly stipulated. With respect to what property it does and to what it does not take effect.

3. The right of pre-emption takes effect with regard to property, whether divisible or indivisible; but it does not apply to moveable property, and it cannot take effect until after the sale is complete, as far as the interest of the seller is concerned. Additional rules.

4. The right of pre-emption may be claimed by all descriptions of persons. There is no distinction made on account of difference of religion. Not restricted to any particular class.

5. All rights and privileges which belong to an ordinary purchaser, belong equally to a purchaser under the right of pre-emption. Rights and privileges of.

6. The following persons may claim the right of pre-emption in the order enumerated: A partner in the Who may claim pre-emption.

property sold, a participator in its appendages, and a neighbour.

Necessary forms to be observed.

7. It is necessary that the person claiming this right, should declare his intention of becoming the purchaser, immediately on hearing of the sale, and that he should, with the least practicable delay, make affirmation, by witness, of such his intention, either in the presence of the seller, or of the purchaser, or on the premises.

Claim when preferable.

8. The above preliminary conditions being fulfilled, the claimant of pre-emption is at liberty at any subsequent period to prefer his claim to a Court of Justice.*

Rights of the first purchaser.

9. The first purchaser has a right to retain the property until he has received the purchase money from the claimant by pre-emption, and so also the seller in a case where delivery may not have been made.

Rules where the property has undergone alteration while in the possession of the first purchaser.

10. Where an intermediate purchaser has made any improvements to the property, the claimant by pre-emption must either pay for their value, or cause them to be removed; and where the property may have been deteriorated by the act of the intermediate purchaser, he (the claimant) may insist on a proportional abatement of the price; but where the deterioration has taken place without the instrumentality of the intermediate purchaser, the claimant by pre-emption must either pay the whole price, or resign his claim altogether.

* Much difference of opinion prevails as to this point. It seems equitable that there should be some limitation of time to bar a claim of this nature; otherwise a purchaser may be kept in a continual state of suspense. Ziffer and Moohummud are of opinion, (and such also is the doctrine according to one tradition of Aboo Yoosuf), that if the claimant causelessly neglect to advance his claim for a period exceeding one month, such delay shall amount to a defeasance of his right; but according to Aboo Huneefa, and another tradition of Aboo Yoosuf, there is no limitation as to time. This doctrine is maintained in the Futawai Aulumgeeree, in the Moheetoo Surukhsee, and in the Hedaya; and it seems to be the most authentic, and generally prevalent opinion. But the compiler of the Futawai Aulumgeeree admits that decisions are given both ways.

11. But a claimant by pre-emption having obtained possession of, and made improvements to property, is not entitled to compensation for such improvements, if it should afterwards appear that the property belonged to a third person. He will, in this case, recover the price from the seller or from the intermediate purchaser, (if possession had been given), and he is at liberty to remove his improvements.

Rules where the property has been improved by the claimant by pre-emption, and it appear to belong to a third person.

12. Where there is a dispute between the claimant by pre-emption and the purchaser, as to the price paid, and neither party have evidence, the assertion, on oath, of the purchaser must be credited; but where both parties have evidence, that of the claimant by pre-emption should be received in preference.

Where there is a dispute as to the price paid.

13. There are many legal devices by which the right of pre-emption may be defeated. For instance, where a man fears that his neighbour may advance such a claim, he can sell all his property, with the exception of that part immediately bordering on his neighbour's, and where he is apprehensive of the claim being advanced by a partner, he may, in the first instance, agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when if a claimant by pre-emption appear, he must pay the price first stipulated, without reference to the subsequent commutation.

Legal devices by which a claim of pre-emption may be evaded.

CHAPTER. V.

OF GIFTS.

Definition of gift.

1. A gift is defined to be the conferring of property without a consideration.

Essential conditions of.

2. Acceptance and seizin, on the part of the donee, are as necessary as relinquishment on the part of the donor.

Cannot be made to take effect *in futuro.*

3. A gift cannot be made to depend on a contingency, nor can it be referred to take effect at any future definite period.

Delivery and seizin requisite.

4. It is requisite that a gift should be accompanied by delivery of possession, and that seizin should take effect immediately, or, if at a subsequent period, by desire of the donor.

The thing given must be actually existing at the time.

5. A gift cannot be made of any thing to be produced *in futuro;* although the means of its production may be in the possession of the donee. The subject of the gift must be actually in existence at the time of the donation.

An undefined gift of divisible property not valid.

6. The gift of property which is undivided, and mixed with other property, admitting at the same time of division or separation, is null and void, unless it be defined previously to delivery; for delivery of the gift cannot in that case be made without including something which forms no part of the gift.

Rules in case of two or more donees.

7. In the case of a gift made to two or more donees, the interest of each donee must be defined, either at the time of making the gift, or on delivery.

8. A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.

A gift must be express, and must be entirely relinquished by the donor.

9. The cases of a house given to a husband by a wife, and of property given by a father to his minor child, form exceptions to the above rule.

Exceptions.

10. Formal delivery and seizin are not necessary in the case of a gift to a trustee, having the custody of the article given, nor in the case of a gift to a minor. The seizin of the guardian in the latter case is sufficient.

Of seizin by proxy.

11. A gift on a deathbed is viewed in the light of a legacy, and cannot take effect for more than a third of the property; consequently no person can make a gift of any part of his property on his deathbed to one of his heirs, it not being lawful for one heir to take a legacy without the consent of the rest.

Of gift on a deathbed.

12. A donor is at liberty to resume his gift, except in the following instances:

Resumption admissible.

13. A gift cannot be resumed where the donee is a relation, nor where any thing has been received in return, nor where it has received any accession, nor where it has come into the possession of a second donee, or into that of the heirs of the first.

Except in certain cases.

14. Besides the ordinary species of gift, the law enumerates two contracts under the head of gifts, which however more nearly resemble exchange or sale. They are technically termed *Hiba bil Iwuz,* mutual gift, or

Two peculiar kinds of gift.

gift for a consideration, and *Hiba ba shurt ool Iwuz*, gift on stipulation, or on promise of a consideration.

Of Hiba bil Iwuz.

15. *Hiba bil Iwuz* is said to resemble a sale in all its properties; the same conditions attach to it, and the mutual seizin of the donees is not, in all cases, necessary.

Of Hiba ba shurt ool Iwuz.

16. *Hiba ba shurt ool Iwuz*, on the other hand, is said to resemble a sale in the first stage only; that is, before the consideration for which the gift is made has been received, and the seizin of the donor and donee is therefore a requisite condition.

CHAPTER VI.

OF WILLS.

Nuncupative and real wills equally valid.

1. There is no preference shown to a written over a nuncupative will, and they are entitled to equal weight, whether the property which is the subject of the will be real or personal.

Of legacies.

2. Legacies cannot be made to a larger amount than one-third of the testator's estate, without the consent of the heirs.

To an heir.

3. A legacy cannot be left to one of the heirs without the consent of the rest.

Distinction betw[illegible] pro-perty ac[illegible]ed by inhe[illegible]tance and by will.

4. There is this difference between the property which is the subject of inheritance and that which is the subject of legacy. The former becomes the property of the heir by the mere operation of law; the latter does not become the property of the legatee until his consent shall have been obtained either expressly or impliedly.

Legacies precede claims of inheritance.

5. The payment of legacies to a legal amount precedes the satisfaction of claims of inheritance.

And debts precede legacies.

6. All the debts due by the testator must be liquidated before the legacies can be claimed.

Acknowledgment of a debt to an heir.

7. An acknowledgment of debt in favour of an heir on a deathbed resembles a legacy; inasmuch as it does not avail for more than a third of the estate.

Of the subject of a legacy.

8. It is not necessary that the subject of the legacy should exist at the time of the execution of the will. It

is sufficient for its validity that it should be in existence at the time of the death of the testator.

Of illegal provisions.

9. The general validity of a will is not affected by its containing illegal provisions, but it will be carried into execution as far as it may be consistent with law.

Special rule relative to legatees.

10. A person not being an heir at the time of the execution of the will, but becoming one previously to the testator's death, cannot take the legacy left to him by such will; but a person being an heir at the time of the execution, and becoming excluded previously to the testator's death, can take the legacy left to him by such will.

A legacy may be retracted by implication.

11. If a man bequeath property to one person, and subsequently make a bequest of the same property to another individual, the first bequest is annulled; so also if he sell or give the legacy to any other individual; even though it may have reverted to his possession before his death, as these acts amount to a retractation of the legacy.

Rule in case of excessive legacies.

12. Where a testator bequeaths more than he legally can to several legatees, and the heirs refuse to confirm his disposition, a proportionate abatement must be made in all the legacies.

And of different legacies to the same person.

13. Where a legacy is left to an individual, and subsequently a larger legacy to the same individual, the larger legacy will take effect; but where the larger legacy was prior to the smaller one, the latter only will take effect.

And of the same legacy

14. A legacy being left to two persons indiscriminately, if one of them die before the legacy is payable, the

whole will go to the survivor; but if half was left to each of them, the survivor will get only half, and the remaining moiety will devolve on the heirs; so also in the case of an heir and a stranger being left joint legatees.

to two individuals.

15. Where there is no executor appointed, the father or the grandfather may act as executor, or in their default their executors.

Of Executors.

16. A Moohummudan should not appoint a person of a different persuasion to be his executor, and such appointment is liable to be annulled by the ruling power.

Should be Moohummudans.

17. Executors having once accepted cannot subsequently decline the trust.

Cannot resign.

18. Where there are two executors, it is not competent to one of them to act singly, except in cases of necessity, and where benefit to the estate must certainly accrue.

Rule where there are two.

CHAPTER VII.

OF MARRIAGE, DOWER, DIVORCE, AND PARENTAGE.

Definition of marriage.

1. Marriage is defined to be a contract founded on the intention of legalizing generation.

Essentials of.

2. Proposal and consent are essential to a contract of marriage.

Conditions of.

3. The conditions are discretion, puberty, and freedom of the contracting parties. In the absence of the first condition, the contract is void *ab initio;* for a marriage cannot be contracted by an infant without discretion, nor by a lunatic. In the absence of the two latter conditions, the contract is voidable; for the validity of marriages contracted by discreet minors, or slaves, is suspensive on the consent of their guardians or masters. It is also a condition, that there should be no legal incapacity on the part of the woman; that each party should know the agreement of the other; that there should be witnesses to the contract; and that the proposal and acceptance should be made at the same time and place.

Competency of witnesses to.

4. There are only four requisites to the competency of witnesses to a marriage contract; namely, freedom, discretion, puberty and profession of the Moosulmaun faith.

Special rules regarding them.

5. Objections as to character and relation, do not apply to witnesses in a contract of marriage, as they do in other contracts.

Proposal may be made by agency, or by

6. A proposal may be made by means of agency, or by letter; provided there are witnesses to the receipt of

the message or letter, and to the consent on the part of the person to whom it was addressed. letter.

7. The effect of a contract of marriage is to legalize the mutual enjoyment of the parties; to place the wife under the dominion of the husband; to confer on her the right of dower, maintenance,* and habitation; to create, between the parties, prohibited degrees of relation and reciprocal rights of inheritance; to enforce equality of behaviour towards all his wives on the part of the husband, and obedience on the part of the wife; and to invest the husband with a power of correction in cases of disobedience.

Effect of the contract.

8. A freeman may have four wives, but a slave can have two only.

Number of wives.

9. A man may not marry his mother, nor his grand-mother, nor his mother-in-law, nor his step-mother, nor his step-grand-mother, nor his daughter, nor his grand-daughter, nor his daughter-in-law, nor his grand-daughter-in-law, nor his step-daughter, nor his sister, nor his foster-sister, nor his niece, nor his aunt, nor his nurse.

Enumeration of prohibited relations.

10. Nor is it lawful for a man to be married at the same time to any two women who stand in such a degree of relation to each other, as, that, if one of them had been a male, they could not have intermarried.

Additional prohibitions.

11. Marriage cannot be contracted with a person who is the slave of the party, but the union of a freeman with a slave, not being his property, with the consent

Of freemen and slaves.

* The right of a wife to maintenance is expressly recognized; so much so, that if the husband be absent and have not made any provision for his wife, the Law will cause it to be made out of his property; and in case of divorce, the wife is entitled to maintenance during the period of her probation.

of the master of such slave, is admissible; provided he be not already married to a freewoman.

Of the religion of the parties.

12. Christians, Jews, and persons of other religions, believing in one God, may be espoused by Moohummudans.

Presumption of marriage.

13. Marriage will be presumed, in a case of proved continual cohabitation, without the testimony of witnesses; but the presence of witnesses is nevertheless requisite at all nuptials.

Capacity to contract.

14. A woman having attained the age of puberty, may contract herself in marriage with whomsoever she pleases; and her guardian has no right to interfere if the match be equal.

Right of guardians.

15. If the match be unequal, the guardians have a right to interfere with a view to set it aside.

Where an infant contracts.

16. A female not having attained the age of puberty, cannot lawfully contract herself in marriage without the consent of her guardians, and the validity of the contract entirely depends upon such consent.

Limitation.

17. But in both the preceding cases the guardians should interfere before the birth of issue.

Contract when dissoluble by the parties.

18. A contract of marriage entered into by a father or grand-father, on behalf of an infant, is valid and binding, and the infant has not the option of annulling it on attaining maturity; but if entered into by any other guardian, the infant so contracted may dissolve the marriage on coming of age, provided that such delay does not take place as may be construed into acquiescence.

19. Where there is no paternal guardian, the maternal kindred may dispose of an infant in marriage; and in default of maternal guardians the government may supply their place.

Of guardians for marriage.

20. A necessary concomitant of a contract of marriage is dower, the maximum of which is not fixed, but the minimum is ten dirms,* and it becomes due on the consummation of the marriage (though it is usual to stipulate for delay as to the payment of a part) or on the death of either party, or on divorce.

Of dower. Minimum of. When due.

21. Where no amount of dower has been specified, the woman is entitled to receive a sum equal to the average rate of dower granted to the females of her father's family.

Where no amount fixed.

22. Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand.

Whether prompt or deferred.

23. It is a rule that whatsoever is prohibited by reason of consanguinity is prohibited by reason of fosterage; but as far as marriage is concerned, there are one or two exceptions to this rule; for instance a man may marry his sister's foster-mother, or his foster-sister's mother, or his foster-son's sister, or his foster-brother's sister.

Disqualification of fosterage and consanguinity. Exceptions.

24. A husband may divorce his wife without any misbehaviour on her part or without assigning any cause; but before the divorce becomes irreversible, according to the more approved doctrine, it must be repeated three times, and between each time the period

Of the rules of Divorce.

* The value of the dirm is very uncertain. Ten dirms according to one account make about six shillings and eight pence sterling. See Note to Hamilton's translation of the Hidaya page 122, volume 1.

of one month must have intervened; and in the interval he may take her back either in an express or implied manner.

Conditions precedent to re-union.

25. A husband cannot again cohabit with his wife who has been three times irreversibly divorced, until after she shall have been married to some other individual and separated from him either by death or divorce; but this is not necessary to a re-union, if she have been separated by only one or two divorces.

Of a deathbed divorce.

26. If a husband divorce his wife on his deathbed, she is nevertheless entitled to inherit, if he died before the expiration of the term (four months and ten days) of probation, which she is bound to undergo before contracting a second marriage.

What amounts to a divorce.

27. A vow of abstinence made by a husband, and maintained inviolate for a period of four months, amounts to an irreversible divorce.*

Of divorce purchased.

28. A wife is at liberty, with her husband's consent, to purchase from him her freedom from the bonds of marriage.

Another mode of divorce.

29. Another mode of separation is by the husband's making oath, accompanied by an imprecation as to his wife's infidelity, and if he in the same manner deny the parentage of the child of which she is then pregnant, it will be bastardized.

Of Impotency.

30. Established impotency is also a ground for admitting a claim to separation on the part of the wife.

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* There is recognized a species of reversible divorce, which is effected by the husband comparing his wife to any member of his mother, or some other relation prohibited to him, which must be expiated by emancipating a slave, by alms, or by fasting. This divorce is technically termed *Zihar*.—Hidaya, book iv. chap. ix.

31. A child born six months after marriage is considered to all intents and purposes the offspring of the husband; so also a child born within two years after the death of the husband or after divorce.

Rules relative to parentage.

32. The first born child of a man's female slave is considered his offspring, provided he claim the parentage but not otherwise; but if after his having claimed the parentage of one, the same woman bear another child to him, the parentage of that other will be established without any claim on his part.

Relative to the children of a female slave.

33. If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established.

Of acknowledgment of parentage.

CHAPTER VIII.

OF GUARDIANS AND MINORITY.

Term of minority

1. All persons, whether male or female, are considered minors until after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period.

Subdivision of.

2. There is a subdivision of the state of minority, though not so minute as in the Civil Law, the term minor being used indiscriminately to signify all persons under the age of puberty; but the term *Subee* is applied to persons in a state of infancy, and the term *Moorahiq* to those who have nearly attained puberty.*

Of their privileges.

3. Minors have not different privileges at different stages of their minority, as in the English law.†

Of guardians.

4. Guardians are either natural or testamentary.

Of the same.

5. They are also near and remote. Of the former description are fathers and paternal grand-fathers and their executors and the executors of such executors.

* "The great distinction therefore was into majors and minors; but minors were again subdivided into *Puberes* and *Impuberes*; and *Impuberes* again underwent a subdivision into *Infantes* and *Impuberes*."—Summary of Taylor's Roman Law, page 124. In the Moohummudan Law a person after attaining majority is termed *Shab* till the age of thirty-four years; he is termed *Kohul* until the age of fifty-one, and *Sheikh* for the remainder of his life.

† The ages of male and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor, and at twenty-one is at his own disposal, and may alien his lands, goods and chattels. A female also at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands.—See Blackstone's Commentaries, vol. 1, page 463.

Of the latter description are the more distant paternal kindred, and their guardianship extends only to matters connected with the education and marriage of their wards.

6. The former description of guardians answers to the term of curator in the Civil Law, and of manager in the Bengal Code of Regulations; having power over the property of the minor for purposes beneficial to him, and in their default this power does not vest in the remote guardians, but devolves on the ruling authority.

Powers of near guardians.

7. Maternal relations are the lowest species of guardians, as their right of guardianship for the purposes of education and marriage takes effect, only where there may be no paternal kindred nor mother.

Guardianship of maternal relations.

8. Mothers have the right (and widows *durante viduitate*) to the custody of their sons until they attain the age of seven years, and of their daughters until they attain the age of puberty.

Duration of mother's controul.

9. The mother's right is forfeited by marrying a stranger, but reverts on her again becoming a widow.

Special rules.

10. The paternal relations succeed to the right of guardianship, for the purposes of education and marriage, in proportion to the proximity of their claims to inherit the estate of the minor.

Right of the paternal relations.

11. Necessary debts contracted by any guardian for the support or education of his ward, must be discharged by him on his coming of age.

Of necessary debts.

12. A minor is not competent *sui juris* to contract marriage, to pass a divorce, to manumit a slave, to make

Disqualifications of a minor.

a loan, or contract a debt, or to engage in any other transaction of a nature not manifestly for his benefit, without the consent of his guardian.

Competency of.

13. But he may receive a gift, or do any other act which is manifestly for his benefit.

Of his immoveable property.

14. A guardian is not at liberty to sell the immoveable property of his ward, except under seven circumstances, viz. 1st, where he can obtain double its value; 2dly, where the minor has no other property, and the sale of it is absolutely necessary to his maintenance; 3dly, where the late incumbent died in debt which cannot be liquidated but by the sale of such property; 4thly, where there are some general provisions in the will which cannot be carried into effect without such sale; 5thly, where the produce of the property is not sufficient to defray the expences of keeping it; 6thly, where the property may be in danger of being destroyed; 7thly, where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

Exceptions.

Of his personal property.

15. Eevery contract entered into by a near guardian on behalf and for the benefit of the minor, and every contract entered into by a minor with the advice and consent of his near guardian, as far as regards his personal property, is valid and binding upon him; provided there be no circumvention or fraud on the face of it.

Exception.

Responsibility of.

16. Minors are civilly responsible for any intentional damage or injury done by them to the property or interests of others; though they are not liable in criminal matters to retaliation or to the *ultimum supplicium,* but they are liable to discretionary chastisement and correction.

CHAPTER IX.

OF SLAVERY.

1. There are only two descriptions of persons recognized as slaves under the Moohummudan Law. First, infidels made captive during war; and, secondly, their descendants. These persons are subjects of inheritance, and of all kinds of contracts, in the same manner as other property.

Of legal slavery.

2. The general state of bondage is subdivided into two classes, and slavery may be either entire or qualified, according to circumstances.

Slavery entire or qualified.

3. Qualified slaves are of three descriptions: the *Mookatib*; the *Moodubbir*, and the *Oom-i-wulud*.

Of qualified slaves.

4. A *Mookatib* slave is he between whom and his master there may have been an agreement for his ransom, on the condition of his paying a certain sum of money, either immediately, or at some future period, or by instalments.

Of a *Mookatib* slave.

5. If he fulfil the condition he will become free; otherwise he will revert to his former unqualified state of bondage. In the mean time his master parts with the possession of, but not with the property in him. He is not however in the interval a fit subject of sale, gift, pledge or hire.

Rules relative to.

6. A *Moodubbir* slave is he to whom his master has promised *post-obit* emancipation—such promise however may be made absolutely, or with limitation; in other words, the freedom of the slave may be made to depend

Of a *Moodubbir* slave.

generally on the death of his master, whenever that event may happen; or it may be made conditionally, to depend on the occurrence of the event within a specified period.

Rules relative to.

7. This description of slave is not a fit subject of sale or gift, but labour may be exacted from him, and he may be let out to hire, and in the case of a female she may be given in marriage. Where the promise was made absolutely, the slave becomes free on the death of the master, whenever that event may happen; and, where made conditionally, if his death occurred within the period specified.

Exceptions to the above general rules.

8. The general law of legacies and debts is applicable to this description of slaves, they being considered as much the right of the heirs as any other description of property: consequently they can only be emancipated to the extent of one-third of the value of their persons, where the master leaves no other property; and they must perform emancipatory labour for the benefit of the heirs to the extent of the other two-thirds; and where the master dies insolvent, they do not become free until, for the benefit of the deceased's creditors, they have earned by their labour, property to the full amount of their value.

Of an *Oom-i-wulud.*

9. An *Oom-i-wulud* is a female slave who has borne a child or children to her master.

Rules relative to.

10. The law is the same regarding this description of slave as regarding the *Moodubbir*, with this difference in her favor, that she is emancipated unconditionally on the death of her master; whether he may or may not have left other assets, or whether he may have died in a state of insolvency or otherwise. But it should be

observed that the parentage of the children of such slave is not established in her master unless he acknowledge the first born.

Disqualifications of slaves.

11. Slaves labour under almost every species of legal incapacity. They cannot marry without the consent of their masters. Their evidence is not admissible nor their acknowledgments (unless they are licensed,) in matters relating to property. They are not generally eligible to fill any civil office in the state, nor can they be executors, sureties or guardians (unless to the minor children of their master by special appointment) nor are they competent to make a gift or sale, nor to inherit or bequeath property.

Indulgences granted.

12. But, as some counterpoise to these disqualifications, they are exempted from many of the obligations of freedom. They are not liable to be sued except in the presence of their masters; they are not subject to the payment of taxes, and they cannot be imprisoned for debt. In criminal matters the indulgences extended to them are more numerous.

Of licensed slaves.

13. Any description of slave however may be licensed, either for a particular purpose or generally for commercial transactions; in which case they are allowed to act to the extent of their license.

Rules relative to the marriage of.

14. Masters may compel their slaves to marry. Unqualified slaves may be sold to make good their wives dower and maintenance, and qualified slaves may be compelled to labour for the same purposes. A man cannot marry a female slave, so long as he has a free wife; nor can he under any circumstances marry his own slave girl, nor can a slave marry his mistress.

Slavery of relations prohibited.

15. Persons who stand reciprocally related within the prohibited degrees cannot be the slaves of each other.

Of the issue of slaves.

16. Where issue has been begotten between the male slave of one person and the female slave of another, the maxim of *partus sequitur ventrem* applies, and the former has no legal title to the children so begotten.

Question as to a person's selling himself into slavery.

17. It is a question how far the sale of a man's own person is lawful when reduced to extreme necessity. It is declared justifiable in the *Moheet oo-surukhsee*, a work of unexceptionable authority. But while deference is paid to that authority, by admitting the validity of the sale, it is nevertheless universally contended that the contract should be cancelled on the application of the slave, and that he should be compelled by his labour to refund the value of what he had received from his purchaser.

Of servitude.

18. It is admitted however by all authorities that a person may hire himself for any time, even though it amount to servitude for life; but minors so hired may annul the contract on attaining majority.

CHAPTER X.

OF ENDOWMENTS.

1. An endowment signifies the appropriation of property to the service of God; when the right of the appropriator becomes divested, and the profits of the property so appropriated are devoted to the benefit of mankind.

Definition of an endowment.

2. An endowment is not a fit subject of sale, gift or inheritance; and if the appropriation be made *in extremis*, it takes effect only to the extent of a third of the property of the appropriator. Undefined property is a fit subject of Endowment.

Rules relative to.

3. Endowed property may be sold by judicial authority, when the sale may be absolutely necessary to defray the expence of repairing its edifices or other indispensable purpose, and where the object cannot be attained by farming or other temporary expedient.

Sale of—when allowable.

4. In case of the grant of an endowment to an individual with reversion to the poor, it is not necessary that the grantees specified shall be in existence at the time. For instance, if the grant be made in the name of the children of A with reversion to the poor, and A should prove to have no children, the grant will nevertheless be valid, and the profits of the endowment will be distributed among the poor.

Grant of—to a person not in existence.

5. The ruling power cannot remove the superintendent of an endowment appointed by the appropriator, unless on proof of misconduct; nor can the appropriator himself remove such person, unless the liberty of

Superintendent of—not removable *quamdiu se bene gesserit.*

doing so may have been specially reserved to him at the time of his making the appropriation.

Of the succession to.

6. Where the appropriator of an endowment may not have made any express provision as to who shall succeed to the office of superintendent on the death of the person nominated by himself, and he may not have left an executor, such superintendent may, on his death bed, appoint his own successor, subject to the confirmation of the ruling power.

Rules relative to the management of.

7. The specific property endowed cannot be exchanged for other property, unless a stipulation to this effect may have been made by the appropriator, or unless circumstances should render it impracticable to retain possession of the particular property, or unless manifest advantage be deriveable from the exchange; nor should endowed lands be farmed out on terms inferior to their value, nor for a longer period than three years, except when circumstances render such measure absolutely necessary to the preservation of the endowment.

Cases in which the will of the founder may be contravened.

8. The injunctions of the appropriator should be observed except in the following cases: If he stipulate that the superintendent shall not be removed by the ruling authorities, such person is nevertheless removable by them on proof of misconduct. If he stipulate that the appropriated lands shall not be let out to farm for a longer period than one year, and it be dificult to obtain a tenant for so short a period, or, by making a longer lease, it be better calculated to promote the interests of the establishment, the ruling authorities are at liberty to act without the consent of the superintendent. If he stipulate that the excess of the profits be distributed among persons who beg for it in the mosque, it may nevertheless be distributed in other places and

among the necessitous, though not beggars. If he stipulate that daily rations of food be served out to the necessitous, the allowance may nevertheless be made in money. The ruling authorities have power to increase the salaries of the officers attached to the endowment, when they appear deserving of it, and the endowed property may be exchanged, when it may seem advantageous, by order of such authorities; even though the appropriator may have expressly stipulated against an exchange.

Case of two superintendents.

9. Where an appropriator appoints two persons joint superintendents, it is not competent to either of them to act separately; but where he himself retains a moiety of the superintendence, associating another individual, he (the appropriator) is at liberty to act singly and of his own authority in his self-created capacity of joint superintendent.

General rule for public and private endowments.

10. Where an appropriation has been made by the ruling power, from the funds of the public treasury, for public purposes, without any specific nomination, the superintendence should be entrusted to some person most deserving in point of learning; but in private appropriations, with the exceptions above mentioned, the injunctions of the founder should be fulfilled.

CHAPTER XI.

OF DEBTS AND SECURITIES.

Responsibility of heirs.

1. Heirs are answerable for the debts of their ancestors, as far as there are assets.

Of debts acknowledged on a deathbed.

2. The payment of debts acknowledged on a deathbed must be postponed until after the liquidation of those contracted in health, unless it be notorious that the former were *boná fide* contracted; and a deathbed acknowledgment of a debt in favor of an heir is entirely null and void, unless the other heirs admit that it is due.

Case of two persons jointly contracting a debt.

3. If two persons jointly contract a debt and one of them die, the survivor will be held responsible for a moiety only of the debt; unless there was an express stipulation that each should be liable for the whole amount: for the law presumes that each were equal participators in the profits of the loan, and that one should not be responsible for the share of advantage acquired by the other.

And being joint sureties.

4. So also where two persons are joint sureties for the payment of a debt, if one of them die, the survivor will not be considered as surety for the whole debt; unless there was an express stipulation that each should be surety for the whole, and that the one should be surety of the other.

In certain cases partners are jointly and severally responsible.

5. It is different where two partners are engaged in traffic, contributing the same amount in capital, and being equal in all respects, in which case the one partner is responsible for all acts done and for all debts con-

tracted by the other. But this is not the case with regard to other partnerships, in which cases a creditor of the concern cannot claim the whole debt from any one of the partners severally, but must either come upon the whole collectively, or if he prefer his claim against any one individual partner, it must be only to the extent of his share.

6. Necessary debts contracted by a guardian on account of his ward must be discharged by the latter on his coming of age.

Of necessary debts contracted by guardians.

7. A general inhibition cannot be laid on a debtor to exclude him entirely from the management of his own affairs; but he may be restrained from entering into such contracts as are manifestly injurious to his creditor.

Inhibition of debtors.

8. If a debtor, on being sued, acknowledge the debt, he must not be immediately imprisoned; but if he deny, and it be established by evidence, he should be committed forthwith to jail.

Proof of debt by confession and by evidence.

9. If, after judgment, there should be any procrastination on the part of a debtor who has been suffered to go at large, and he may have received a valuable consideration for the debt, or if it be a debt on beneficial contract, he should be committed to jail notwithstanding he plead poverty.

Case of procrastinating debtors.

10. But if the debt had been contracted gratuitously and without any valuable consideration having been received (as in the case of a debt contracted by a surety on account of his principal), the debtor should not be imprisoned unless the creditor can establish his solvency.

Special rule in certain cases.

Imprisonment how determinable.

11. It is left discretionary with the judicial authorities to determine the period of imprisonment in cases of apparent insolvency.

Liberation no bar to subsequent arrest.

12. But the liberation of a debtor does not exempt him from all future pursuit by his creditors. They may cause his arrest at a subsequent period, on proof of his ability to discharge the debt.

Of attachment and sale.

13. In the attachment and sale of property belonging to a debtor, great caution is prescribed. In the first instance, his money should be applied to the liquidation of his debt; next, his personal effects, and last of all his houses and lands.

Of mortgages and pledges.

14. There is no distinction between mortgages of lands and pledges of goods.

Of Hypothecation.

15. Hypothecation is unknown to the Moohummudan Law, and seizin is a requisite condition of mortgage.

Of mortgages.

16. The creditor is not at liberty to alienate and sell the mortgage or pledge at any time, unless there was an express agreement to that effect between him and the debtor, as the property mortgaged is presumed to be equivalent to the debt, and as the debt cannot receive any accession, interest being prohibited.

Obligations of mortgager and mortgagee.

17. It is a general rule that the pawnee is chargeable with the expence of providing for the custody, and the pawner with the expence of providing for the support of the thing pledged; for instance, in the case of a pledge of a horse, it is necessary that the pawner should provide his food, and the pawnee his stable.

Mortgagee cannot use the pledge.

18. Where property may have been pawned or morgaged in satisfaction of a debt, it is not lawful for the

pawnee or mortgagee to use it without the consent of the pawner or mortgager, and if he do so, he is responsible for the whole value.

Mortgage destroyed in the mortgagee's hands.

19. Where such property, being equivalent to the debt, may have been destroyed, otherwise than by the act of the pawnee or mortgagee, the debt is extinguished; where it exceeds the debt, the pawnee or mortgagee is not responsible for the excess, but where it falls short of the debt, the deficiency must be made up by the pawner or mortgager; but if the property were wilfully destroyed by the act of the pawnee or mortgagee, he will be responsible for any excess of its value beyond the amount of the debt.

Privilege of a mortgagee.

20. If a person die, leaving many creditors, and he may have pawned or mortgaged some property to one of them, such creditor is at liberty to satisfy his own debt out of the property of the deceased debtor, which is in his own possession, to the exclusion of all the other creditors.

CHAPTER XII.

OF CLAIMS AND JUDICIAL MATTERS.

No limitation.

1. There is no rule of limitation to bar a claim of right according to the Moohummudan Law.*

Parole and writing equally valid.

2. A claim founded on a verbal engagement is of equal weight with a claim founded on a written engagement.

Of informal deeds.

3. Informality in a deed does not vitiate a contract founded thereon, provided the intention of the contracting parties can otherwise be clearly ascertained.

Of priority.

4. The general rule with respect to all claims is that priority in point of time confers superiority of right.

Conflicting claims of purchase and gift.

5. Where the priority of either cannot be ascertained, a claim founded on purchase is entitled to the preference over a claim founded on gift.

Contracts generally devolve.

6. Contracts are not dissolved generally by the death of one of the contracting parties, but they devolve on the representatives as far as there may be assets;

Exceptions.

unless the subject of the contract be of a personal nature, such for instance as in the case of a lease, if either the landlord or farmer die, the contract ceases on the occurrence of that event.

Additional exception.

7. So also in the case of partnership and joint concerns of any description, where the surviving partners

* In the *Buhroorayiq* an opinion is cited from the *Mubsoot*, to the effect that if a person causelessly neglect to advance his claim for a period of thirty three years, it shall not be cognizable in a court of justice; but this opinion is adverse to the received legal doctrine.

are not bound to continue in business with the heirs of the deceased partner, and *vice versâ;* and the obligation is extinguished, as well by civil as by natural death.

8. Oaths are not administered to witnesses. Of witnesses.

9. In civil claims the evidence of two men or one man and two women is generally requisite. Their number.

10. Slaves, minors and persons convicted of slander are not competent witnesses. Incompetent witnesses.

11. The evidence of a father or grand-father, in favor of his son or his grand-son, and *vice versâ;* of a husband in favor of his wife, and *vice versâ,* and of a servant in favor of his master, and *vice versâ,* is not admissible. Inadmissible evidence.

12. Nor is the evidence of a partner admissible in matters affecting the joint concern. Of the same.

13. In matters which fall peculiarly within the province of women, female evidence is admissible, uncorroborated by male testimony. Female evidence, where admissible.

14. Hearsay evidence is admissible to establish birth, death, marriage, cohabitation and the appointment of a Kazee; as the eye witnesses to such transactions are frequently not forthcoming, And hearsay evidence.

15. No respect is paid to any superiority in the number of witnesses above the prescribed number adduced in support of a claim. Superfluous evidence.

16. The evidence of witnesses which tends to establish the plaintiff's claim to any thing not contained in his own statement, must be rejected; for instance, if Of evidence exceeding the claim.

any of his witnesses depose to a larger sum being due to him than that claimed by himself.

And differing as to the ground of action.

17. The evidence of witnesses which tends to establish the plaintiff's claim on a ground different from that alledged by himself, must be rejected; for instance, if the plaintiff were to claim by purchase and his witnesses were to depose to his claim being founded on gift.

Where it differs as to the amount due.

18. Where a debt is claimed, and some of the witnesses depose to the debt of the whole sum claimed and others to a part of it only, the plaintiff is entitled to such part only of the sum claimed.

Of the general issue.

19. Where a defendant pleads the general issue, the *onus probandi* rests on the plaintiff.

Of a special plea containing defensive matter.

20. Where a plea contains defensive matter, such as payment or satisfaction, the *onus probandi* rests on the defendant; the rule being the same as in the Civil Law, that in every issue the affirmative is to be proved.

Of the junction of a special plea and the general issue.

21. A defendant may in some cases plead both the general issue and a special plea, where they are not inconsistent; and the *onus probandi* in such case rests on the plaintiff, where the special plea is not necessary to the defence; for instance, a man sues another for half an estate, alledging that he was born in wedlock of the same father and mother as the defendant. Here the defendant may deny the allegation generally, and at the same time plead that the plaintiff was born of a different family.

A claim at variance with a

22. A claim is not admissible which may be repugnant to a former claim, both of which cannot stand;

for instance, a person in a former suit having denied that a certain individual was his brother, cannot subsequently claim the inheritance of that person on the plea of such relation.

former one inadmissible.

23. But if the claim be at variance with a former one, and they can both consistently stand, it is admissible; for instance, a claim having been advanced to property in virtue of purchase, the same property may be claimed by the same person in virtue of inheritance, but if the claim of inheritance had been prior, a subsequent claim of purchase is not admissible; as it is manifest that they cannot both consistently stand.*

Unless they can both consistently stand.

24. If a man adduce a claim and have no evidence to support it, the general rule is, that the defendant must be put to his oath, and if he decline swearing, judgment should be given for the plaintiff; but if he deny on oath, he is absolved from the claim.

Rule where the plaintiff has no evidence.

25. Where both parties have evidence, that of the plaintiff is generally entitled to preference. Thus for instance, where the creditor and debtor are at issue as to the amount of a debt, and both parties have evidence, that of the former is entitled to preference, but where neither party has evidence, the assertion on oath of the latter is to be credited.

And where both parties have evidence.

Examples.

26. It is also a general principle that where there is evidence adduced on both sides, *cæteris paribus*, the preference should be given to the witnesses of the party

Additional rule where both parties have evidence.

* At first sight there might appear to be a distinction without a difference in this case; but the reason of the rule is that an heir might consistently make a purchase of property which had not devolved, but of which he was in expectancy. But it is contrary to all probability that he should have purchased, after the demise of the ancestor, property to which he had represented himself actually entitled in virtue of inheritance.

whose claim is greater, or who has the greater interest in the subject matter. Thus, for instance, in an action arising out of a contract of sale, where there is a disagreement about the price between the seller and purchaser, both parties having evidence, the witnesses who depose to the larger sum being due, that is of the plaintiff, are entitled to preference.

Example.

Case of sale, the parties being at issue both as to the price and the goods, and each having evidence.

27. And where there is a disagreement, both as to the price and goods, both parties having witnesses, the evidence adduced by the seller is entitled to preference, as far as it affects the amount of the price, and that of the purchaser as far as it affects the quality and quantity of the goods.

And where neither has evidence.

28. If neither party have evidence, they should both be put to their oaths, and if both consent to swear, the contract must be dissolved; but if one decline and the other swear, the decree should be passed in favour of the swearer.

And where they are at issue as to the condition of a sale.

29. But if the disagreement exist with respect to the conditions only of a sale, such as the period of payment, &c., and both parties consent to swear, the assertion on oath of the party against whom the claim is made is entitled to preference.

Suit between husband and wife, or between lessor and lessee.

30. Where a husband and wife dispute as to the amount of dower, both parties having evidence, that of the wife must be credited, as it proves most;* so also in a dispute between a lessor and lessee, the evidence of each party is entitled to preference as far as their

* But there is an exception to this general rule. If the proper dower of the wife, that is to say the average rate of dower paid to her paternal female relations, exceed the amount claimed by her, the evidence adduced by the husband is entitled to preference, because that goes to prove some remission on her part. See Hidaya, vol. 1st, Page 154.

individual interests are at stake; the evidence of the lessor being received as to the amount of the rent, and that of the lessee as to the duration of the term.

Claim of property in deposit or in pledge.

31. Where property is claimed and the person in whose possession it is, states that he is merely a depositary or pawnee of an absent proprietor, and adduces evidence in support of his assertion, the claim must be dismissed; but the claim should be rejected *in limine* where the claimant admits his title to have been derived from such absentee proprietor.

Of *exparte* Judgment.

32. Judgment cannot be passed *exparte*, the reason given being, that decisions must be founded either on the defendant's confession, or (notwithstanding his denial) on proof by witnesses; and where he is absent, it cannot be said whether he would have denied or admitted the claim.

Of arbitration.

33. When cases are referred to arbitration, it is requisite that the decision of the arbitrators should be unanimous.

PRECEDENTS

OF

Moohummudan Law

RELATIVE TO

INHERITANCE, CONTRACTS, AND MISCELLANEOUS SUBJECTS.



CHAPTER I.

PRECEDENTS OF INHERITANCE.

CASE I.

QUESTION 1. A person dies leaving three sons. In what proportions will they inherit the property left by him?

REPLY 1. The property will be made into three portions, of which each son will take one.*

Sons inherit equally.

Q. 2. Supposing that person to have divided his property during his life time between two of his three sons, and that those two sons and their heirs had possession of the property so given to them, in this case will the third son have a legal claim to any part of the property so disposed of?

R. 2. If the father was in sound disposing mind, when he divided his property, giving distinct portions to each of his two sons, and they retained separate possession of their respective portions, the third son will not be entitled to any part of the property.

But the father may disinherit any one of his sons during his life-time.

* See Principle of Inheritance, 2.

CASE II.

Q. The plaintiff sues her younger brother to recover the proprietary right to a sixteenth share of certain lands, the property of her deceased elder brother. It appears that those lands were not ancestrel, but entirely self-acquired, and that on the death of the proprietor his family consisted of a daughter, a widow, two brothers and two sisters. Under these circumstances, are the sisters, on the death of the proprietor, entitled to participate in his personal acquisitions, and admitting that they are entitled, under these circumstances, could they have any just claim, supposing the proprietor had left a son?

No distinction between ancestrel and acquired property.

R. All the property of the deceased proprietor must on his death be distributed among his two brothers, his two sisters, his widow, and his daughter. The law in this respect recognizes no distinction between property which has descended from ancestors and property obtained by personal acquisition.* Under these circumstances therefore, the sisters of the deceased are entitled to participate in the estate acquired by him. If the deceased proprietor had left a son, both his brothers and his sisters would have been excluded† from the inheritance, and would not have been entitled to any share. The property would in that case have devolved exclusively on the son and daughter and widow; the widow taking an eighth‡ as her legal share, and the residue being divided between the son and daughter, in the proportion of a double share to the male.§

Sisters inherit with brothers and daughters.

Both brothers and sisters are excluded by a son.

CASE III.

Q. A woman dies leaving property which she obtained by inheritance from her husband and son. Will such property devolve on the relations of her husband

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*See Prin: Inh: 1. †21. ‡14. §8.

and son, who are not relations of the woman herself, or on her father? and is there any distinction between real and personal property in such a case of inheritance?

R. The property which the widow obtained by inheritance from her husband and son, will not devolve on the relations either of her husband or her son, who are not her relations; but it will devolve on her father, brothers, or other relations, who may be her lawful heirs; and there is no* distinction between real and personal property in such case; but it will all be inherited in the same manner. The enumeration of heirs, as laid down in the *Surajya* is as follows:—"They begin with the persons entitled to shares, then they proceed to the residuary heirs by relation, then they return to those entitled to shares according to their respective rights of consanguinity, then to the more distant kindred, then to the successor by contract, then to him who was acknowledged as a kinsman through another, then to the person to whom the whole property was left by will, and lastly to the public treasury." But the relations of the husband and son of a woman (not being her own relations,) do not come within the description of any of the heirs enumerated.

The property (however acquired) of a woman devolves on her own heirs.

No distinction between real and personal property.

CASE IV.

Q. Are the offspring of slave girls entitled to inherit the estate of their father?

R. All the children of a person deceased, whether they are the offspring of a slave girl or a free married woman, are without distinction entitled to succeed to their respective shares, according to the law of inheritance.†

The children by slave girls inherit equally with other children.

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* Prin: Inh: 1.

† But to establish the parentage of children by slave girls it is necessary that the father should acknowledge them, if they are by different mothers; but if they are by the same mother, the acknowledgment of the first born is sufficient.—See Principles of Parentage. 32.

CASE V.

Q. If, according to the allegation of the widow, her adversary became an apostate from the Moohummudan faith subsequently to the demise of her husband, will this circumstance exclude him from the inheritance?

Apostacy after the death of an ancestor is no bar to inheritance.

R. If the apostacy occurred, as stated, subsequently to the demise of the husband, his brother will not thereby be excluded from his right as heir, because; when the inheritance devolved, he was of the same religion as her deceased husband.*

CASE VI.

Q. What conditions are necessary to the validity of an adoption, according to the Moohummudan Law, and what rights appertain to a person legally adopted? Has he any claim of inheritance to the property left by his adopting father, or is the adopting father at liberty to dispose of all his property by sale, or gift, during his life time, and thereby to leave his adopted son entirely destitute?

Adoption confers no right of inheritance.

R. During the life time, or after the death of the adopting father, the adopted son has no claim upon his property.† The adopting father's control over his own

* Difference of religion is one impediment to inheritance.—See Prin: Inh: 6.

† By the term adoption here used, affiliation by distinct claim of parentage is not intended, but merely the reception, by the adopting father, into his family, of a child, who notoriously and avowedly belongs to another family. In this particular the Moohummudan seems to agree with the English, and the Hindoo with the Roman Law. Adoption among the Romans, as among the Hindoos at this day, was intimately connected with religious or superstitious notions, and "it was thought disgraceful not to keep up and preserve the domestic gods and sacred things of the family." Whereas among ourselves and among the Moohummudans, it seems to have been suggested, to use an expression of Dr. Taylor, merely as a resource of orbity. The same learned author, in a note to his chapter on adoption, observes—"It is not unusual, we all know even among us, for friendship to adopt in effect, the children of strangers in blood; but here is the plain difference between such acts of friendship and the legal adoption of the Romans: the friend and intended

property is absolute, and although the adopted son may be thereby left entirely destitute, he is at liberty to dispose of his property as he pleases, by sale, gift, or otherwise.

CASE VII.

Q. Supposing the claimant in this case to have been arraigned and convicted on suspicion of the murder of the woman to whose property he lays claim as lawful heir, will this circumstance exclude him from the inheritance?

R. Mere suspicion of murder is not sufficient to exclude from the right of inheritance. Unless the crime be fully established, the suspected person has a right to succeed to the property as heir, supposing his title to the inheritance to be otherwise unexceptionable.*

Suspicion of murder, not fully proved, does not exclude from inheritance.

CASE VIII.

Q. A Moosulmaun is involved in debt, by having become security for another. On his death are his heirs liable to pay the debt, without reference to the amount of the property which they may have inherited from him, and are they answerable for the debt, supposing

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benefactor may change his mind when he pleases, but the adopted child at Rome obtained by the adoption legal rights of inheritance and succession to the adoptor, of which he could not be arbitrarily or wantonly dispossessed."—Summary of Taylor's Roman Law, vol. 1, page 74.

* The claimant in this case was probably convicted under the absurd rules of evidence observed in the Moohummudan criminal Law, by which an accused person was convicted and punished, not according to the offence of which he had been guilty, so much as according to the quantum of evidence adduced against him. It appears that the claimant was sentenced to 12 years imprisonment on *suspicion* of the murder with which he was charged; and to justify exclusion from inheritance, complete proof is requisite. It may here be observed that homicide, of whatever description, however accidental, if fully proved, excludes the person who committed it from inheriting the property of the person slain, provided he was the cause, but not if he was the occasion merely. See Prin: Inh. 6.

the deceased to have left no property? if so, the heirs being two brothers, a nephew and a son, which of them is liable?

Heirs are answerable for the debts of their ancestors, as far as there are assets, but no farther.

R. If the debtor left property at his death, the creditor may claim his debt from the heir of the deceased, who has become possessed of the property left; and the debts of a deceased person must be liquidated, before claims of inheritance can be satisfied. If the amount of the property exceed the amount of the debts, the heirs will share the residue; but if the property fall short of the amount of the debts, the whole of it must be appropriated to their liquidation, and the heirs will then not be responsible for what remains due. If the deceased left no property, the claim of the creditors will not lie against his heirs. If at the death of the debtor he leave a son, two brothers, and one brother's son, the former will be liable, and the residue, after the creditors shall have been satisfied, will devolve entirely on him, according to law. The brother and brother's son cannot inherit any of the property during his life time.*

CASE IX.

Q. A woman has two sons. One of them dies in the life time of his mother, leaving a daughter. After the woman's death, that daughter lays claim to the property left by her in right of her father. Will her claim be good against the brother of her deceased father, that is to say, her uncle?

Claim to inherit through a deceased person not admissible.

R. The daughter can have no claim against her uncle, because her father died in the life time of his mother, who has another son living, by whom the daughter is excluded. She can therefore have no claim of inheritance to the property of her grand-mother.†

*See Prin: Inh: 21. †9.

CASE X.

Q. Supposing any of the heirs to be insane or blind, do these circumstances operate to preclude them from inheritance?

R. Mental derangement, or any description of insanity, and blindness, are not among the impediments to succession; but persons afflicted in this manner are entitled to their legal shares as other heirs.*

Insanity and blindness do not disqualify from inheriting.

CASE XI.

Q. Two women during the life-time of their mother execute a deed in favour of two other heirs, renouncing their right of inheritance to their mother's property. They each received one thousand rupees from the persons in whose favour they executed the deed, and for a period of nearly twelve years after their mother's death they advanced no claim; but ultimately sued for their legal shares of the property left by their mother. An alleged deed of gift by the mother to the persons in whose favor the renunciation was made, and of which mention is made in the deed executed by the two women, is proved on investigation never to have existed. Under these circumstances will the deed of renunciation executed by the women be any bar to their present claim?

R. Renunciation implies the yielding up a right already vested, or the ceasing or desisting from prosecuting a claim maintainable against another. It is evident

Renunciation of inheritance in life-time of ancestor, null and void.

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* Both the causes here mentioned operate to exclude from the inheritance agreeably to the provisions of the Hindoo Law:—"Eunuchs and outcasts, persons born *blind* or deaf, *madmen*, *idiots*, the dumb and such as have lost the use of a limb, are excluded from a share of the heritage".—Sir W. Jones's translation of the Institutes of Munoo, Chapter IX § 201. But these absurd provisions seem to be entirely obsolete in the present day.

that, during the life-time of the mother, the daughters have no right of inheritance, and their claim on that account is not maintainable against any person during her life-time. It follows therefore that this renunciation, during the mother's life-time, of the daughters' shares is null and void; it being in point of fact giving up that which had no existence. Such act cannot consequently invalidate the right of inheritance supervenient on the mother's death, or be any bar to their claim of the estate left by her. The omission to advance a claim for a period of nearly twelve* years is no legal bar to the ultimate admission of such claim.†

No limitation to claim of.

CASE XII.

Q. A person contracted marriage with a woman, who was his equal in point of circumstances, and against whom there was no legal objection. He had a family of children by this marriage. He afterwards connected himself with a dancing woman, to whom however he was not married, and by her also he had several children. He died without making a will, and the question is, whether his children by the unmarried woman above alluded to, are entitled to any portion of his estate, or

* The limitation of twelve years fixed by Section XIV. Regulation 3, 1793, Section VIII. Regulation 7, 1795, and Section XVIII. Regulation 2, 1803, modified by Section III. Regulation 2, 1806, may perhaps be held to supersede the Moohummudan Law in this particular; but there certainly do appear to be claims, such for instance as a claim to dower, the non-adducement of which within a certain period, it would be harsh to pronounce a ground for being not cognizable.

† Futwas similar in purport to the above were delivered on this occasion by the Cauzee of the Provincial Court and the Mooftee of the City Court of Patna; but a contrary opinion was delivered by the Mooftee attached to the Zillah Court of Shahabad, to whom also the point was referred. He maintained that the execution of the deed for which a consideration had been received by the obligors was binding against them, although the right parted with was not in existence at the time. The question however having been ultimately referred to the Law Officers of the Sudder Dewanee Adawlut and other learned authorities, it was satisfactorily ascertained that the opinion of the majority was a correct exposition of the law.

whether the whole of it should devolve on his widow and the children begotten by him in wedlock?

Illegitimate children do not inherit their father's property.

R. Under the circumstances stated, if a marriage be not proved to have taken place between the deceased and the dancing woman in question, and if it be evident that her children are the fruit of fornication, their parentage will not be established in the deceased; according to the saying of the prophet—"Offspring belong to such as have *consorts*, but fornicators are prohibited from laying claim." Consequently the parentage not being established, and there being no will, no part of the property of the deceased belongs to the illegitimate children, but the whole will go to those born in wedlock. It is laid down in the *Kafee*—"The offspring of fornication and the offspring repudiated by *laan* or imprecation, take the maternal estate only, but not the paternal, nor can the father inherit from them. The father of such offspring cannot be considered as standing in any degree of relation to them, and their relation to the father being cut off, they are consequently excluded from claiming relation with his family." It is also laid down in the *Hummadeea* that the parentage of the fruit of fornication is not established in the father.

CASE XIII.

Q. A person died, leaving certain landed property, and four sons, two of whom died childless. The survivors, A and B, lived in joint possession of the estate. B afterwards died, leaving two sons, C and D, and two daughters, E and F. These persons remained with their uncle and his sons G and H, as joint proprietors of the lands in question. A then died, and the survivors still continued to live together on the same terms—afterwards C and G successively died, and D has since disappeared, nor can any tidings of him be obtained.

Last of all H died, leaving a widow, who is the only present surviving claimant except the daughters of B. In what proportions will these persons respectively be entitled to inherit the estate?

Property of missing persons should be kept in abeyance for ninety years from the time of their birth.

They cannot inherit, or be inherited of, during this interval.

R. Under these circumstances, the estate should be made into sixteen portions, of which the widow of H is entitled to two, and E and F to seven, or three and a half each. The remaining seven shares, which properly belong to the missing person D, should not immediately devolve on any of the other heirs; but four shares of it should be deposited in the hands of a trustee, and the remaining three should be entrusted to the person or persons in possession of the rest of the property, to be kept until the expiration of the period allowed for the re-appearance of the missing person. This period is ninety years reckoning from his birth. If he re-appear in this interval, the whole seven shares should be made over to him, but if no intelligence of his fate can be obtained before the expiration of the above period, his heirs will inherit the four shares which were deposited in the hands of a trustee, and the remaining three shares will devolve on the other heirs who came into possession at the former distribution.*

* The Principle of the Law laid down in this case is, that a missing person is considered defunct, as far as regards the property of others, and living, as far as regards his own property. He shall not inherit from others during the period of ninety years which is allowed for his re-appearance, nor shall others inherit from him during this interval.

The surviving representatives of B were D and E and F, and the surviving representative of A was H. The first three persons were entitled to eight shares of the property in right of their father B, and the last mentioned to eight in right of his father A; but of the first eight shares D, by virtue of his being a male, was entitled to four, and E and F to two shares each. After D disappeared, H died, leaving a widow who was entitled to two shares only of his eight portions, and the remaining six devolved on the children of his paternal uncle B; of which six, D as male, was entitled to three or a double portion, but it being a rule that a missing person is to be considered living as to his own property, and defunct as to the property of others, after the disappearance of D, his four shares, which descended to him absolutely from his father, and of which he was in possession before he disappeared, should be placed in

CASE XIV.

Q. Supposing Mussummaut Buhorun to have been the wife of Ruhm Ali, will the property left by him go to both his widows, namely, Mussummaut Buhorun and Mussummaut Bheekun equally, or in what proportions; according to law are their rights equal or different?

Widows share equally.

R. In case of there being children, an eighth share of the husband's property goes to the widow, and in case of there being no children, a fourth. In both cases the widows will share equally.*

CASE XV.

Q. What is the nature of the contract of marriage, and what are the conditions, by the existence of which a woman becomes entitled to succeed to her husband's property on his death?

Conditions of a legal marriage.

R. The term *uqud*, or contract, in a strict sense signifies tying together; and the joining of two persons in matrimony is termed a contract of marriage. The proposal and consent of the parties are essential to the contract. The bride should express consent if she be adult, and the guardians and witnesses should be present at the ceremony. Under these circumstances, the wife is competent to inherit her husband's property, supposing her not to have been divorced from him, not to have killed her husband, not to be the slave of any one, and not to be of a different religion. Such a widow takes an eighth where there are children, and a fourth where there are none.† The remainder goes to the legal sharers, in default of them to the residuary heirs,

Impediments to a wife's succession.

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the hands of trustees, and the three shares which would devolve on him only in the event of his proving to have been alive at the date of the death of his cousin H, should be given to the other heirs, to be enjoyed by them, subject only to the condition of the re-appearance of the missing person.

*See Prin: Inh: 14. †14.

in default of them to the distant kindred, and in their default it escheats to the public treasury.

CASE XVI.

Q. A person had a son and two daughters. The son died before him. On the father's death, besides the two daughters above mentioned, he left a widow and a son's daughter, claimants of his estate. It is proved that a certain sum was settled on the widow as dower, and the question now therefore is, to what proportion of the estate she is entitled, in satisfaction of her dower and in virtue of her legal share of inheritance; and to what shares of the estate of the deceased are his daughters and son's daughter entitled?

In addition to her prior claim of dower, the widow takes a legal share.

R. If the amount specified as dower exceed the value of the estate, the heirs will not be entitled to succeed to any part of it, but the whole will appertain to the wife in virtue of her claim of dower. If the amount specified fall short of the value of the estate, the proceeds must in the first instance be applied to satisfy the claim of dower. Of the residue one-eighth* must be given to the widow as her legal share of the inheritance, and the remaining seven-eighths must be distributed equally between the two daughters. A son's daughter has no right of succession while there are daughters.† Authorities: In the *Hidaya*, on the chapter treating of privileged slaves—"In the case of property appertaining to an insolvent estate, the right of the heirs is defeated." So also in the *Dar*, a commentary on the *Ghoorur*—"No right of property remains to the heirs in the case of an estate, the assets of which are not more than sufficient to answer the demands against it." So also in the *Shareefeeah*, a commentary on the

A son's daughter cannot inherit with daughters.

Authorities.

* See Prin; Inh: 14 † 19

Sirajyah—"Next the discharge of his just debts from the whole of his remaining effects; then the payment of his legacies out of a third of what remains after his debts are paid, and lastly, the distribution of the residue among his successors."

These quotations are sufficient to show that the liquidation of the debts precedes the distribution of the property among the heirs. In the *Shareefeeah*, also treating of widows, it is stated that one-eighth belongs to them with children, and treating of daughters, that two-thirds belong to two or more, and treating of son's daughters, that they cannot inherit where there are sons or daughters of the deceased, and that any surplus after the distribution reverts to such sharers as are entitled thereto.

CASE XVII.

Q. A person having built a dwelling house, made a present of it to his daughter at the time of her marriage. The husband to whom she was united had some children by her, and had also some children by slave girls. Both the husband and wife are now dead. Does the house belong of right to the children of the wife alone, or are the children of the husband by the slaves entitled to succeed as heirs also?

The wife's children will succeed to her estate, exclusively, if she survive her husband; but if the husband survive her, his heirs will share in one-fourth.

R. If the husband died before his wife, his children by the slave girls have no right to the house. According to Law the children of the wife will inherit all the property both real and personal left by their mother. If the wife died before her husband, he was entitled to one fourth of her property both real and personal, and his legal share of it, according to Law, must be distributed among his children, whether by the wife or slave girls, in the proportion of two shares for a son and one for a daughter.

CASE XVIII.

Q. A person made over to his wife, by a deed of *Beea Mokasa,** all his property in satisfaction of part of her dower. The wife remained in possession of the property so transferred during her life-time, and died, childless, before her husband; a short time afterwards her husband also died, leaving by another wife a son and daughter, who lay claim to the property left by him. But the two nephews (one of whom is now represented by his son) of the deceased wife claim the entire property in virtue of the deed of *Beea Mokasa** by which it was conveyed to her in satisfaction of dower. In this case to whom will the litigated property of right belong?

The heirs of both husband and wife will succeed equally to her estate, she dying childless and before her husband.

R. Under these circumstances, half the estate left by his wife legally devolved on her husband in right of inheritance. On his death that half will go to his children by another wife. The remaining half will be divided equally between the two nephews of the deceased wife, and after the death of one of them, his entire share will devolve on his son.†

CASE XIX.

Q. A woman marries a second husband during the life-time of her first, and continues to cohabit with such second husband for the period of twenty nine years, during which time she had by him several children.

* The strict meaning of the term "*Mokasa*" is "Retaliare et coæquare *rationes*"—*Meninski*—but in the language of the Law, when connected with the term *Beea*, or sale, it means a sale of property for property, or barter, which is sale in one shape, and purchase in another.—Hidaya.

† The reason of this is that although (the husband having made over all his property to his wife in satisfaction of dower) his heirs could not possibly have had any claim to succeed to the property on the wife's death, had she survived her husband, yet she having died, childless, before her husband, he, as heir, was entitled to one moiety of the property left by her as his legal share, and consequently no distribution of the property having taken place during his life-time, his heirs were after his death entitled to the same proportion.

Will she, in virtue of such marriage, be entitled to inherit the property of her second husband on his death; and supposing a man to die, leaving a widow, three sons, a daughter and a brother, claimants to his property, to what proportions of it will each of them be entitled; and if the deceased, during his last sickness, had declared his intention that the persons claiming to be his widow and his children should take all his property, will such disposition hold good; and in what proportions will they share?

Of a woman marrying again during the life of her first husband.

R. So long as the first marriage shall continue undissolved by divorce or otherwise, the marriage of a woman to a second husband is wholly illegal; and if cohabitation be the consequence of such second marriage, it amounts to adultery, and the issue of such intercourse are bastards, who, with their mother, are wholly incompetent to inherit the estate of their deceased father. If the second question relate to the parties mentioned above, neither the person claiming to be his widow nor her children are entitled to any proportions of the property, and the whole will go to the brother by right of consanguinity; but the verbal disposition made by the deceased during his last sickness will hold good to the extent of a third of his property, of which the person claiming to be his widow and her sons will take shares alike. If the question relate generally to cases of persons having a legal claim to inheritance, the answer is, that the share of the widow is one-eighth, and the remainder should be distributed, to the exclusion of the brother, among the sons and daughters, in the proportion of a double share to the male.

Of the children by such second marriage.

CASE XX.

Q. A person died seized of a landed estate which he inherited from his father. He had three wives. The

first wife died during his life-time, leaving one son. By his second and third wives, who survived him, he had two sons and two daughters, all living; besides which persons he left a sister, so that there are altogether eight claimants to his estate. His sons took possession of the entire property without allotting any portions to his widows or daughters. Subsequently to his death his sister (and on her decease her heirs) and the daughter of his third wife lay claim to shares of the property. The sons in possession plead that it has been the immemorial usage of their family to exclude females from the inheritance, to which the claimants reply by denying the usage, and alleging that they had already partially obtained their right of inheritance in money and lands. Under these circumstances are the parties claiming entitled to succeed to any portion of the estate left by the deceased,—and if so, what is the extent of their respective shares?

Sisters are excluded by sons and daughters.

R. Possession is of various kinds. It is not expressly stated on what tenure and for what period the deceased and his father held the property, nor is the original acquirer mentioned, nor the mode by which the acquisition was made; neither is it distinctly stated that besides the persons enumerated there were no other claimants of the estate at the death of the proprietor; which not being satisfactorily ascertained, it is impossible to declare into how many shares the property should legally be distributed: but it is concluded that the object is to ascertain the legal shares of those specified on the supposition that there were no other persons entitled to participate. On this presumption therefore it may be stated that, according to the Law of Inheritance, a sister and her heirs are excluded from the inheritance by sons and daughters of the deceased. An eighth therefore should be given to the widows, two

shares to each of the sons, and one share to each of the daughters, supposing that none of these claimants had compromised or surrendered their rights, and that all claims requiring previous satisfaction had been adjusted; as is laid down in the *Shureefeeah*, a treatise on inheritance,—"Brothers and sisters by the same father and mother and by the same father only are all excluded by the son and the son's son in how low a degree soever." "Wives take in two cases: a fourth goes to one or more on failure of children, and son's children, how low soever, and an eighth with children or son's children in any degree of descent." "If there be brothers and sisters by the same father and mother, the male has the portion of two females."

Authority for their exclusion.

For the share of the widow.

For the male's double share.

CASE XXI.

Q. Has a woman any right to share in the property left by her deceased step-son?

R. A step-mother is not considered in law a mother. She is called wife of the father. She only who bears the child is termed mother. As a step-mother is not viewed in the same light as a mother, she cannot take the maternal share of inheritance, which is a right appertaining to mothers alone.

Of a step-mother.

CASE XXII.

Q. On the death of a widow in whose favour an assignment of property had been made by her husband in lieu of her dower, she leaving a son, a daughter, and a daughter by a second wife of her husband, which of these persons will succeed to her property?

R. Her son will take two parts and her daughter one. The daughter by the second wife of her husband has no title to any share.

Of a step-daughter.

CASE XXIII.

Q. A person having received a gift of certain landed property dies, leaving his father's mother, his mother, and his paternal half-uncle; which of these persons will be entitled to inherit his estate, and in what proportions; and supposing he left another paternal half-uncle, how will his property be distributed among the four persons above enumerated?

Of a grand-mother with a mother.

R. If a person die, leaving his grand-mother, his mother, and only one paternal half-uncle, the property will be made into three parts: one of which will go to his mother and two to his paternal half-uncle; and if he left two paternal half-uncles, they will each take one share, the remaining third going to his mother.*

CASE XXIV.

Q. Admitting the relation of the parties to the deceased proprietor to be as stated, how much of his property will go to his mother, and how much to the plaintiffs—his brother's sons?

Of a mother with brother's sons.

R. One-third will go to his mother, and two-thirds to the plaintiffs, by reason of their male consanguinity and residuary title.†

CASE XXV.

Q. 1. A woman (A) had three daughters: B, C and D. The last mentioned (D) died before her mother, leaving children. On the death of A, her two surviving daughters (B and C) take possession of her property; afterwards B died. Under these circumstances, how will

* The grand-mother is in this case excluded agreeably to Prin: Inh: 37.

† It is presumed in this case that there were no sons, nor sons' children, nor brothers, nor sisters, in which case, according to Prin: Inh: 34, the mother is entitled to one-third.

the property of B be divided between her sister (C) and her late sister's (D's) children, being a son E and a daughter F?

Of a sister with the children of her deceased sister.

R. 1. Under the circumstances stated, the property, according to the Moohummudan Law, will be vested in C alone, because D died before her mother and B died after the decease of her mother, leaving a sister (C). According to Law, E and F are not entitled to inherit, as C is the legal heir, or the only person for whom the Law prescribes a legal share, and E and F are merely distant kindred, for whom no provision is made under such circumstances, and who, while a legal sharer is living, can have no right of inheritance, as is laid down in the *Shurhi-oo-Tahavi*,—"The distant kindred cannot inherit while a legal sharer survives."

Q. 2. By reason of the death of D before her mother, are her children excluded from inheriting their maternal grand-mother's estate or not? If they are not excluded from the inheritance, in what proportions will they share her property?

Of a daughter with the children of a deceased daughter.

R. 2. The death of D before her mother causes her children to be excluded from inheriting their maternal grand-mother's estate, because B (the daughter of A) is a legal sharer, and E and F are distant kindred, and, according to the doctrine already cited, distant kindred are excluded from inheritance where there is a legal sharer.*

CASE XXVI.

Q. Zuhooroonissa, a female Moosulmaun, dies, leaving as claimants to her property two half-brothers and a half-sister, by the same father only, and a son and a

* Prin: Inh: 9.

widow and two daughters of her uterine brother, who died before her. Pending the suit, the widow of her uterine brother dies. Under these circumstances, to which of the relatives above specified will the property of Zuhooroonissa legally go, and in what proportions?

Of half-brothers and half-sisters, with sons & daughters of a whole brother.

R. Under the circumstances stated, the whole of the property left by Zuhooroonissa will go to her half-brothers and her half-sister. The property will be divided into five shares: of which each half-brother will take two and the half-sister one. The son, the widow and the two daughters of her uterine brother, cannot succeed to any part of the property, because the brother's widow has not any right of succession, and because there being half-brothers and a half-sister, the son and daughters of the uterine brother are excluded from the succession, as is declared in the Law of Inheritance.*

CASE XXVII.

Q. A, the original proprietor of a landed estate, has a son, B, and a daughter, C. B dies during the lifetime of A, leaving a son, D. Afterwards A dies, leaving C and D. Previously to the distribution C dies, leaving two daughters, E and F. Under these circumstances, to what shares of the property left by A and C are their representatives E and F and D respectively entitled?

Of a son's son (the son having died du-

R. The fact of D's father (B) having died during the life-time of his grand-father A, operates to his imperfect

* There is a distinction made between brethren by the same father only and brethren by the same mother only. See Prin: Inh: 26 and 30, the latter being sharers and taking a portion at all events (unless there be children or son's children how low soever, or a father or paternal grand-father how high soever) and the former being only residuaries; but both classes exclude the children of brethren, even though they be by the same father and mother.

exclusion.* Had such not been the case, D would have been entitled to two out of the three shares, only one-third going to the daughter C. Under the circumstances stated, one-half is the property of C, and the other half devolves upon D. On the death of C, leaving two daughters, E and F and her nephew D, the half of the property which she inherited must be divided into three parts, two of which belong to E and F, and one to D, so that by this means D (or his representatives) is eventually entitled to two-thirds of the entire property left by his grand-father A, and E and F (or their representatives), the grand-daughters in the female line of A, are entitled to one-third only of his estate.

ring the life-time of the father) and two daughters of a daughter.

CASE XXVIII.

Q. A person, named Sheikh Ahmud, lays claim to all the property, real and personal, of a deceased woman, named Motee Jaun, also to recover a debt due to the deceased by two individuals; on the plea, that his grand-father had made a conditional grant of a portion of land to the said deceased, stipulating that she was to enjoy the profits thereof during her life-time, but that after her death it was to revert to the donor; and that she, during her life-time, and a short time before her death, executed a deed of gift in favor of him, the claimant, making over to him, at her death, the said

* In this case there seems to be an inaccuracy in the Futwa in the use of the term *hujb noqsan* or imperfect exclusion, which signifies an exclusion from one share and an admission to another, and it takes place in respect to five persons only; the husband or wife, the mother, the son's daughter and the sister by the same father. Thus, for instance, the share of the wife is one-fourth when there are no children, but if there are children she is excluded from the fourth share, and is admitted to an eighth share only. But the son or son's son (the son having died during the life-time of the father) is perfectly excluded from any *share* of the inheritance, technically so called. He comes in merely as a residuary in his own right. The share of the one daughter, C, is half by law, and he takes the other half as residuary. At the second distribution the share of the two daughters, E and F, is two-thirds, and he takes the remaining third as residuary.

land, together with all her property, real and personal; and assigning to him the amount of the debt due to her, (being ninety four rupees thirteen annas,) from the individuals above alluded to. Four other persons also lay claim to the property, namely, Munna Khan, Mean Khan, Jeevun Khan, and Chand Khan; the two former on the plea, that the deceased was daughter of the paternal aunt and daughter of the maternal uncle of them respectively; and the two latter, that she was the wife of the brother of their grand-father. Sheikh Ahmud and Mean Khan have each adduced satisfactory evidence in support of their respective allegations. Under these circumstances, which of the claimants is entitled to succeed to the property left by the deceased woman?

Of the grandsons of a husband's brother.

R. Neither Sheikh Ahmud, nor Jeevun Khan, nor Chand Khan, have any claim of inheritance to the property of the deceased. But the witnesses have satisfactorily established the allegation of Sheikh Ahmud, respecting the gift, which is virtually a bequest, because it appears from the testimony adduced, that the gift was made in the last sickness of the deceased, and every donation made on a death-bed is a bequest; according to the *Shurhi Viqaya*,—"A death-bed gift, though actually made, must be deferred until death, because its conditions are dependant on that event; for if the property be insufficient to cover all the debts, the gift will be null, and if there be no debt, it will be good only as far as a third of the estate." Also according to the *Madun*,—"When a person on a death-bed makes a gift, it must be taken out of a third of his estate." Therefore after defraying the funeral expences, and liquidating the debts of the deceased, a third of what remains must be given to Sheikh Ahmud, in virtue of the bequest. According to the *Sirajyyah*,—"There belong to the property of a

Of a deathbed gift.

person deceased four successive duties: first his funeral ceremony and burial without superfluity of expence, yet without deficiency; next the discharge of his just debts from the whole of his remaining effects; then the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors, according to the divine book, to the traditions, and to the assent of the learned. They begin with the persons entitled to shares, who are such as have each a specific share allotted to them in the book of Almighty God; then they proceed to the residuary heirs by relation, and they are all such as take what remains of the inheritance, after those who are entitled to shares, and if there be only residuaries, they take the whole property; next to residuaries, for special cause, as the master of an enfranchised slave, and his male residuary heirs; then they return to those entitled to shares according to their respective rights of consanguinity, then to the more distant kindred." Now Munna Khan and Mean Khan are among the distant kindred; and in the event of there being no residuaries, or legal sharers, the distant kindred inherit; and in that case, the two individuals aforesaid will succeed to the two-thirds of the property which remain after defraying the funeral expences, the discharge of the debts, and the payment of the legacies out of a third, according to the authority above quoted.*

CASE XXIX.

Q. A woman (A) after the death of her husband (B) takes possession of his property which he inherited from

* Here the son of the father's sister and the son of the mother's brother will both inherit; the former taking by reason of his paternal connexion two-thirds, and the latter one third by reason of his maternal connexion. Where claimants of the same degree belong to different sides of the family, one does not exclude the other; but had the claimants been the son of a father's brother, and the son of a father's sister, the latter would have been excluded.—See Prin: Inh: 53.

his grand-father, and continues seized of the same during her life-time; but under what title she held is not clearly ascertained. Under these circumstances, there being two claimants, A's half-brother, and the grandson of B's half-sister by the same father only, on which of the two will the property devolve? If it should devolve on both, in what proportions will they share?

Case of a grand-son of a half-sister by the same father only, and a widow's half-brother.

R. It appears that the property in this case was ancestrel, but it is not clear under what title A came into possession. From the fact of it's having been ancestrel, it follows that it belonged to B, and after his death it should devolve on his heirs. The seizin of A is of no effect to prove her proprietary right. According to the question it appears there are no other heirs of B than his widow and a half-sister's grand-son; but the widow (A), as well as being one of the heirs, is a creditor of her husband also; for, according to the Moohummudan Law, dower is a necessary debt in case of a marriage, insomuch that there can be no contract of marriage without dower. If B, the husband, during his life time satisfied the debt of his wife's dower, or she voluntarily relinquished her claim to it, notwithstanding the possession of A, the property will be made into four shares, of which the widow (A) will take one as her legal share, and after her death the same share will go to her half-brother, and the remaining three shares will go to B's half-sister's grand-son. If B died without satisfying the claim of his wife's dower, and she did not relinquish it, the debt due on account of her dower should be paid to A's heir, being her half-brother, before the distribution of the estate to satisfy the claims of inheritance. After satisfying the debt of dower, if there remain any surplus, it will be made into four parts and be distributed among the parties in the proportions already specified.

If it had been proved that A was seized of her husband's property in virtue of proprietary right, as for instance in exchange of her dower, in this case the whole property would have devolved on her half-brother as her legal heir, and B's half-sister's grand-son would have been excluded from the inheritance. According to the question however it does not appear to have been proved that the possession of A was of this nature; but it has been proved that the property formed the ancestrel estate of B. The proper answer to the question therefore is as originally stated. By the term ancestrel estate is meant property which, having belonged to his grand-father, devolved on the husband in right of inheritance. It is declared in the *Hidaya*—"It is a rule, that if an inheritee's right of property in any thing be proved, still a decree cannot pass in favour of the heirs, until proof be adduced of the death of the inheritee, and of their right of heritage." So that in this case the proof that the property belonged to the grand-father and that he left it as an heritable estate, is proof that it belonged to him of right after the death of his grand-father. In the *Hidaya* also "The payment of dower is enjoined by the Law." So also in the *Sirajya*,—"Next, the discharge of his just debts from the whole of his remaining effects; then, the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors." "Then the offspring of his father or his brothers." "Then the strength of consanguinity prevails: thus a brother by the same father and mother is preferred to a brother by the same father only, and a sister by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the father only; then to the more distant kindred. The third sort are descended from the parents of the deceased; and they are the sister's children and the brother's daughters."

CASE XXX.

Q. In the event of the deed of dower set up by a widow proving to be invalid, will her adversary, who is brother of her husband, succeed, according to the tenets either of the *Soonnee* or *Sheea* sects, to the property left by him? and how will his property be distributed among the heirs according to both doctrines?

Right of a brother, according to the *Soonnee* doctrine.

R. According to the tenets of the *Soonnee* sect, the brother of the deceased will be entitled to a share of the property by right of inheritance, as residuary, after the legal sharers shall have been satisfied. Two tables are subjoined, exhibiting the mode in which the property will be distributed according to the respective allegations of each party. According to the tenets of the *Sheea* sect, the brother has no right of inheritance while there is a daughter. The widow and her daughter will succeed jointly, and on this supposition there is no necessity for defining the shares of inheritance.*

And according to the *Sheea* doctrine.

CASE XXXI.

Q. A person dies, leaving an only daughter and the son of a half-brother by the same father only. Has the latter person any legal claim of inheritance to the property of the deceased?

Of a daughter with a half-brother.

R. It appears that the person alluded to in the above question died leaving a daughter and a half-brother who are the sole claimants. Under these circumstances, his estate will be made into four parts, of which the daugh-

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* By the tabular sketch of the family delivered in by the widow, the husband's brother became entitled to thirty-eight out of two hundred and sixteen shares of the property left by him, or between a fifth and sixth of the estate. According to the calculation made in conformity to the sketch delivered in by the husband's brother, he was declared entitled to one hundred and forty-six out of six hundred and forty-eight, or between a fourth and fifth of the estate.

ter will take two parts, or half, as her legal share, and the other half will go to the half-brother, as residuary, on whose death his son will succeed to it.*

CASE XXXII.

Q. A Moosulmaun gave his daughter in marriage to another, and, on the occasion of the marriage ceremony, bestowed upon her jewels and a variety of other valuables. The husband also gave her some jewels after marriage. The wife died having given birth to a son, since deceased. The father of the wife now claims all the jewels and valuables given to her, as well by himself as by her husband. Is he entitled to the whole of such property, or to any proportion; and if not, to whom do they legally belong?

Of the paraphernalia of a deceased woman.

R. After defraying the expences connected with the funeral ceremony and other acts which must necessarily be performed for the deceased, her whole estate (whether obtained by her on the occasion of her marriage or otherwise) should be made into twelve parts, of which the father is entitled to two and the remaining ten belong of right to her husband.†

CASE XXXIII.

Q. A person dies, leaving a brother, two paternal half grand-uncles, and two daughters of a paternal grand-

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* According to Prin: 16, the daughter takes a moiety, and there being only one residuary heir, who takes the other moiety without a fraction, this case affords an example of the First Principle of Distribution (75).

† The husband obtains so large a portion chiefly in right of his son to whom he is sole heir. On the death of the woman her property should have been made into twelve parts agreeably to Prin: 65—the father being entitled (see Prin: 32) to one sixth, and the husband (See 15) to one fourth—and, as they take their shares (two and three parts of twelve) without a fraction, leaving the remaining seven to be taken by the son as sole residuary heir, this case affords an example of the First Principle of Distribution. (75.)

uncle, who claim his estate. In this case which of the claimants are entitled to succeed according to the Law of Inheritance?

Of distant kindred with legal sharers or residuaries.

R. The mother is a legal sharer and the paternal half grand-uncles are residuaries, and are therefore the heirs of the deceased. The daughters of the paternal grand-uncle are among the distant kindred,* which persons can never take any part of the property so long as a legal sharer or a residuary remains.†

CASE XXXIV.

Q. A woman dies, leaving certain property which she had obtained from her husband in satisfaction of dower. The claimants to her estate are two sisters and the daughter of a son, which son died during her life-time. To what proportions of such property are these persons respectively entitled?

Of two sisters with a son's daughter.

R. The property left by the deceased woman, whether obtained in satisfation of dower, or in whatever manner acquired, should be divided into four parts, of which the daughter of her son is entitled to a moiety,‡ or eight annas in the rupee, and the sisters will take the remaining moiety;§ that is, a quarter, or four each.¶

CASE XXXV.

Q. A woman dies, leaving as her heirs a husband, a daughter and a paternal uncle. In what proportions will those claimants severally succeed to the estate left by her?

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* See Prin: Inh: 47.

† The mother's share in this case would be a third: see Prin: 34. The remaining two-thirds would go to the grand-uncles as residuaries, and the estate would be divided into three parts without a fraction, furnishing an example of the First Principle of Distribution (75.)

‡ See Prin: Inh: 18. § 25. ¶ First Prin: of Dist: (75.)

Of a daughter with a husband and a paternal uncle.

R. The share of the deceased will be made into four parts, of which her husband is entitled to one, or a fourth, as his legal share, the daughter to two, or a moiety, as her legal share, and the paternal uncle to the remaining one, as residuary.*

CASE XXXVI.

Q. Mussummaut Shahamut dies, leaving a daughter (Mussummaut Zainab) who, subsequently to the death of her mother, succeeds to her whole estate. Afterwards, the daughter dying childless, does the whole or a portion of the property which she inherited from her mother vest in her maternal uncle, or does it all appertain to her husband? If they both inherit, how will the property be divided between them?

Of a husband with a maternal uncle.

R. Under the circumstances of the case in question, it appears that Mussummaut Shahamut died leaving a brother, as well as a daughter. Her daughter in this case was entitled to one moiety only of the property; the other moiety belonging of right to the deceased's brother, he being a residuary heir. On the death of the daughter, leaving no issue, her share will be made into two parts, of which one will go to her husband, as his legal share, and the remaining moiety (if there be no other sharers nor residuaries) to her maternal uncle, who is enumerated among the fourth class of the distant kindred.†

CASE XXXVII.

Q. A person dies, leaving a widow, a son of his paternal uncle, two sons of his sister, three daughters of his sister, and six grand-sons of his paternal uncle.

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* First Prin: of Dist. (75.)

† First Prin: of Dist: 75 and Prin: Inh: 46.

Which of these persons will succeed to his property, and in what proportions?

Of a paternal uncle's son with a widow.

R. After defraying the funeral expences of the deceased, the liquidation of his just debts, and the payment of legacies left by him, to the extent of a third of the property, the estate will be made into four parts, of which the widow will take one part, as her legal share,* and the remainder will go to the son of the paternal uncle as residuary. The grand-sons of the paternal uncle will be excluded by reason of the intervention of their father and the others rank among the distant kindred only.† Therefore, under these circumstances, they take no share of the inheritance.‡

Sister's sons are distant kindred.

CASE XXXVIII.

Q. A woman leaves as heirs her brother and sister. In what proportion will her estate be divided between those individuals at her death?

Of a brother with a sister.

R. It will be made into three shares, of which two will go to the brother and one to the sister.§

CASE XXXIX.

Q. A person dies, leaving as his heirs a widow and a brother. How will his property be distributed between them; and what shares will each of them receive?

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* See Prin: Inh: 14. † 45.

‡ This also is an example of the First Principle of Distribution (75). Where there are no children, the share of the widow is one-fourth. The property must consequently be made into four parts, of which the widow takes one as her legal share, and the remainder goes to the son of the paternal uncle without a fraction.

§ Prin: Inh: 22. First Prin: of Dist: (75.)

Of a brother with a widow.

R. It will be made into four parts, of which the widow will take one as her legal share, and the brother the remaining three as residuary.*

CASE XL.

Q. A and B, two brothers, inherited equally their patrimonial property. The former died, leaving a son C, who next died, leaving a son D. B then died, leaving a widow and four daughters. The widow also is since dead. Under these circumstances, how is the property of the two brothers to be distributed among their surviving heirs?

Of a widow with four daughters and a brother's son.

R. It appears from the proceedings that A died before B, and that B died before D. In this case all the property of A will on his death go to his son C, and on his death to his son D. Of the property left by B, an eighth will go to his widow and two-thirds to his daughters as their legal shares. D will be entitled to the rest as residuary. Thus B's property will be made into twenty-four parts,† of which the widow will be entitled to one-eighth or three parts, the daughters to two-thirds or sixteen, and the brother's son or grand-son to the remaining five parts. The widow having died before the distribution, her share will be taken by her daughters.

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* First Principle of Distribution (75), where the parties receive their shares without a fraction. A fourth (agreeably to Prin: Inh: 11) being the share of a widow, when there are no children, the property must be made into four parts, of which she takes one, and the residuary heir the remainder.

† When the portion of one set of sharers is one-eighth and that of another set of sharers two-thirds (as in this case), or one-third, or one-sixth, the rule is that the estate must be made into twenty-four parts (66). This is an example of the First Principle of Distribution, all the heirs getting their portions without a fraction (75).

CASE XLI.

Q. A woman dies, leaving a husband, an infant son, a mother, and a sister. In the presence of all these claimants, the mother of the deceased woman brings an action against her son-in-law to recover from him her maternal share of the dower to which her daughter was entitled. Under these circumstances, has she a right to recover any thing on account of dower from the husband of the deceased woman; and if so, to what proportion of the dower so due is she entitled, and to what shares will the other claimants be respectively entitled to succeed?

Of a son with a mother and husband.

R. The mother of the deceased woman has a good right of action against the husband for her maternal share of the dower due to her daughter, and the entire sum due on that account should be distributed into twelve portions, of which three shares (a fourth)* belong to the husband, two (a sixth)† to the mother, and seven to the infant son; but the sister‡ is not entitled to any thing, she being excluded by the son.§

CASE XLII.

Q. A person died leaving two wives. By the first wife he had one son, and by the second two sons. The son by the first wife died, leaving a wife and two sons. Supposing the deceased son above-mentioned to have assigned over all his property in dower to his wife, has the brother of that wife, on the death of herself and of her two sons, a right to inherit the property which had been so settled upon her in satisfaction of dower, or is

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* See Principle 15. † 33. ‡ 21.

§ First Principle of Distribution (75). Where a fourth and a sixth share occur together (see Principle 65), the division must be by twelve, and this arrangement suiting to satisfy all the legal claimants, there is no occasion for any further process.

be entitled to any share of it? And supposing the deceased son above-mentioned not to have assigned his property in dower, but that his widow was in possession of her husband's legal share, has her brother a right to any share of it, on her death?

Of a paternal half-uncle, with a maternal uncle.

R. If a person, having assigned over all his property to his wife in satisfaction of dower, die, leaving her and two sons, and the sons die before their mother, and she die, leaving a brother, that brother will be legally entitled to all the property left by her. But if she die before her sons, or before one of her sons, and those sons die, leaving their paternal half-uncle or his sons, and their maternal uncle, under these circumstances the paternal half-uncle or his sons will be entitled to the property left by them by reason of their right as residuaries, and the maternal uncle, who is among the distant kindred, will not be entitled to any thing. Supposing the deceased not to have assigned to his wife his property in dower, but that she was in possession of an eighth share thereof, which was her legal right (the remainder belonging to her sons), and that she die before her sons, then her eighth share will devolve upon them, and on their death will go to their paternal half-uncle or his sons. The maternal uncle will not be entitled to any part of it. If one of the sons die, leaving his mother and his brother,* his property will be made into three shares, of which his mother will get one, and his remaining brother two; and if the other son die, leaving his mother, his paternal half-uncle, or sons of that uncle, his property will be made into three shares, of

Of a brother with a mother.

Of a mother with a paternal half-uncle.

* The Law Officer attached to the Zillah Court of Hoogly declared in his Futwa that the property should, in this case of a mother and a brother, be divided into six parts, the mother in such case being entitled to one-sixth only: but this opinion is manifestly erroneous. If indeed there had been more than one brother, the mother would have been entitled to a sixth only. See Principles 33, and 34. This is an example of the First Principle of Distribution (75), there being no fraction.

which one will go to the mother, and the other two to the paternal half-uncle or his sons, in virtue of their residuary claim. If, after that, the mother die, leaving only her brother, her whole property will devolve upon him. The succession of these persons severally to the vested interests cannot be stated, it not having been ascertained which of them survived longest.

CASE XLIII.

Q. A proprietor of land being in joint possession thereof with the son of his daughter, obtains a formal grant of the property in the name of himself and his said grand-son. Afterwards his daughter dies, leaving a son (the grand-son of the proprietor above alluded to), a daughter, a husband of that daughter, and her own husband. Some time subsequently to this event, the proprietor of the land dies, and for a long lapse of time no tidings have been heard of his grand-son, who had travelled to a distant country. The grand-daughter of the proprietor next dies, leaving a son, a daughter, and a husband. After her the son-in-law of the proprietor dies, leaving a son by a second wife. Under these circumstances, of the persons enumerated, that is to say, the husband, the son, and the daughter of the grand-daughter, and the son of the son-in-law (who is half-brother of the proprietor's grand-son), which of the persons will be legally entitled to the land left by the proprietor, and in what shares?

Of a daughter's son and daughter's daughter.

R. Under these circumstances, the right and title to the land will be solely vested in the original proprietor, notwithstanding he may have obtained the formal grant in the joint names of himself and grand-son; because the law pays respect to persons and not to names. If his daughter die before him, she will be excluded from all participation in the property. If the proprietor die,

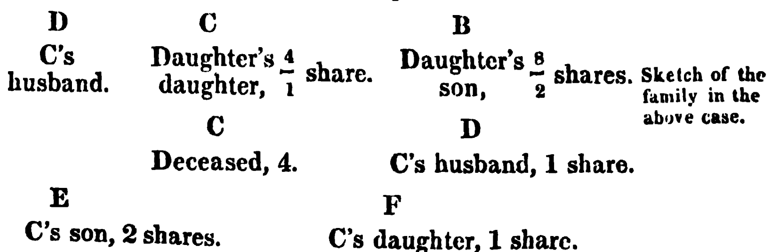
leaving a daughter's son, a daughter's daughter, a daughter's husband, and the husband of a daughter's daughter, in that case the property will be divided into three shares, of which his grand-son will obtain two shares, and his grand-daughter one. The husbands of the daughter and of the daughter's daughter are not entitled to any share. An absentee, concerning whose place of abode, death, or existence, no tidings can be learnt, is, as regards his own property, alive, and as regards that of others, defunct. The ruling power should appoint some one to take charge of his affairs, and his portion should be reserved for the period* of ninety years. Any of his relations who die in this interim will not participate in his property. Supposing the grand-daughter to die, leaving a son, a daughter and a husband, her property will be made into four parts, and distributed among her heirs in the following manner: One share will go to her husband, two to her son, and one to her daughter; and if the original proprietor's son-in-law died, possessing property distinct from that of such proprietor, it will devolve on his son.†

Of a son with a husband and a daughter.

PROPOSITUS.

A

Deceased, $\frac{12}{3}$.



Sketch of the family in the above case.

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* This period is to be reckoned from the date of the absentee's birth.

† First Prin: of Dist: (75).

TOTAL.

F, 1 share. E, 2 shares. D, 1 share. B, 8 shares.*

CASE XLIV.

Q. A person turned away his wife on account of her misconduct. She went to another place and maintained herself by her own exertions for a period of four years. On her death, leaving her husband and a brother's son, which of these two persons is entitled to succeed to her property according to the Law of Inheritance?

Of Separation without divorce.

R. If the person divorced himself from his wife at the time of separation, the only legal claimant to her property will be her brother's son; but if he merely turned her away without a divorce, her coverture still continues, and on her death her husband and her brother's son will succeed to her estate jointly. They will each be entitled to one moiety, the husband to half† as his legal share, and the brother's son to the other half as residuary.‡

Of a husband with a brother's son.

CASE XLV.

Q. A Moosulmaun dies, leaving a son and three daughters, who marry after his death. What will be the respective shares of these persons in the property left by the deceased?

Of a son and three daughters.

R. It will be made into five parts, of which the son will get two§ and the daughters three, or one each.¶

* The property of A must in the first instance be made into three parts, to be divided between his grand-children B and C, so as to give the male a share double that of the female. On C the grand-daughter's death her property must be made into four parts—the share of her husband being one-fourth; but her one share having been multiplied by four, it is necessary to multiply the other portions by the same number, thus A's portion 3 × 4=12, and B's portion 2 × 4=8.

† See Prin: Inh: 15. ‡ First Prin: of Dist: (75). § See Prin: Inh: 3.
¶ First Prin: of Dist: (75).

CASE XLVI.

Q. A woman dies, leaving some ancestrel landed property. A daughter and a brother's son are her only surviving heirs. How will her estate be divided according to law between these two persons?

Of a daughter with a brother's son.

R. Supposing the woman to have no other heirs than those mentioned, her property will be equally divided between her daughter and her brother's son. Half will go to the daughter as her legal share,* and the other half to her brother's son as residuary.†

CASE XLVII.

Q. The proprietor of an estate, which he acquired by his own industry, sold six shares of it during his lifetime, and left the remaining ten shares to devolve on his heirs, who in this case were a son of a paternal uncle and a sister. To what shares will these persons be entitled respectively according to the Law of Inheritance?

Of a sister with a son of a paternal uncle.

R. In this case the ten shares of the estate left by the deceased owner will be divided equally, the sister taking five shares and the son of the paternal uncle the same number.‡

CASE XLVIII.

Q. A person dies, leaving as his heirs a widow, a son, and two daughters. How will his property be distributed among them, and what shares will each of them receive?

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* See Prin: Inh: 16. † First Prin: of Dist: (75).

‡ See Prin: 23 and the First Principle of Distribution (75).

Of a son with a widow and two daughters.

R. It will be made into thirty-two shares, of which the widow will take an eighth, or four shares, the son will take fourteen, and the daughters seven each.*

CASE XLIX.

Q. A person dies, leaving two sons and a widow. How will his property be distributed among them; and what shares will each of them receive?

Of two sons with a widow.

R. It will be made into sixteen parts, of which the widow will take two, and the two sons seven parts each.†

CASE L.

Q 1. The father of a woman, after having disposed of her in marriage, wishes her to consent to a formal renunciation of her share in his estate, on the plea of

* This is an example of the Third Principle of Distribution (77), where the portions of one class cannot be divided without a fraction, and where there is no agreement between those portions and the persons, or, as it is technically termed, where they are *Mootubayun*, that is to say, where they have not one common measure, or terminate in an unit. Thus the widow's share being one-eighth, (Prin: Inh: 14) the property must, in the first instance, be made at least into eight shares, and after the widow has taken her eighth, there will remain seven shares. Besides the widow there are four claimants (one son counting for two daughters, his share being double). Now the agreement or disagreement of these two quantities, 4 and 7, (the sharers and the shares) is to be ascertained, which is effected by diminishing the greater by the smaller quantity on both sides until they agree in one point, which is their common measure, or until they terminate in an unit, when there is no numerical agreement, as in this case. Thus $4 = 7 - 3$ and $3 = 4 - 1$. The rule is then, that the number of persons (4) whose shares are broken, are to be multiplied into the root (8) of the case. Thus: $4 \times 8 = 32$. I have not met with any case exhibiting an example of the second Principle of Distribution, but in page 15 will be found an exemplification of the rule.

† This is a very simple example of the Third Principle of Distribution (77). There being children, the widow's share is one-eighth (Prin: Inh: 14). Making the property therefore into eight parts, the least number from which her share can be extracted, and giving her one-eighth, there remain seven to be divided between the two sons, which obviously cannot be done without leaving a fraction. But the sharers (two) multiplied by three, equal the shares (seven) minus one, which is termed *Mootubayun*, the one number being prime to the other; in which case the rule is (see Prin: of Dist: 77). that the root of the case (that is to say the number of the original division) be multiplied by the number of sharers who cannot get their shares without a fraction. Thus: $8 \times 2 = 16$.

providing for his sons. To this proposal she refuses compliance, which irritates the father to such a degree, that he repudiates her. Is this act on his part allowable?

Of repudiation by a father.

R 1. By the term *allowable* mentioned in the question, it is presumed that the object is to ascertain whether the repudiation on the part of the father operates as a legal impediment to the daughter's succession. But there are only four impediments to succession:—1st, the homicide of the ancestor by the heir; 2nd, difference of religion; 3rd, difference of country; 4th, slavery.

The repudiation on account of a private quarrel by a father, cannot legally operate to exclude from the inheritance a child born in lawful wedlock or whose parentage he had acknowledged.

Q 2. A woman dies, leaving a husband, an infant daughter, and two brothers. Under these circumstances is her husband entitled to succeed to the whole or to what portion of her property?

Of a daughter with a husband and two brothers.

R 2. Under these circumstances a fourth* of the woman's property goes to her husband, half† to her infant daughter and the remainder to her brothers.‡

CASE LI.

Q. The heirs of a deceased proprietor being his widow, one son and one daughter, into how many

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* See Prin: Inh: 15. † 16.

‡ In this case an easy example of the Third Principle of Distribution (77) is exhibited. Where a half and a fourth occur together, the rule agreeably to Prin: Inh: 57 is that the original division must be by 4, but after the husband has taken his fourth or one, and after the daughter has taken her half or two, there remains only one for the two brothers, which cannot be divided between them without a fraction, but 1 and 2 are prime. Therefore the whole number of the original division should be multiplied by the whole number of heirs who cannot get their portions without a fraction. Thus: $4 \times 2 = 8$.

shares should his property be distributed, and to what proportions will these persons be respectively entitled?

Of a son with a daughter and a widow.

R. The estate must be made into twenty-four shares, of which the widow will be entitled to one-eighth or three shares, the son to fourteen, to make his share double that of the daughter, who will be entitled to the remaining seven.*

CASE LII.

Q. A person dies, leaving as his heirs a widow, two sons and a daughter. How will his property be distributed among them; and what shares will each of them receive?

Of two sons with a widow and a daughter.

R. It will be made into forty shares, of which the widow will take an eighth or five shares, the sons will take fourteen each, and the daughter seven.†

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* This is an example of the Third Principle of Distribution (77). The widow's share being one-eighth, the least number of shares must have been eight; but out of eight, when the widow has taken her share (one-eighth) there will remain but seven to be divided among the remaining sharers, who must be reckoned as three (one male always counting for two females) and seven cannot be divided so as to give the son a share double that of the daughter without leaving a fraction. The proportion therefore between the surplus shares and the sharers must be sought for, which will be found to be *Mootubayun* or prime. Thus: $3 \times 2 = 7 - 1$, and in this case the number of sharers must be multiplied into the root of the case, (that is the original division) to give the requisite number of shares. Thus: $3 \times 8 = 24$.

† This also is an example of the Third Principle of Distribution (77). The sharers, it must be remembered, are 5, each son counting for two daughters (their shares being double). After the widow's eighth has been deducted, there will remain seven to be distributed among the five sharers, which cannot be done without a fraction. But five (the number of sharers,) equal seven, the number of shares, minus two, and again two multiplied by two equal five, minus one, which makes them *Mootubayun* or prime, when the rule is, that the number of sharers is to be multiplied into the root of the case. Thus: $5 \times 8 = 40$.

CASE LIII.

Q. A person possessing immoveable property, dies childless, leaving two widows and a brother's son. After the death of the first widow, the second, during the lifetime of the brother's son of her deceased husband, sells the immoveable property so left. Is such sale valid according to Law? Supposing it to be invalid, what are the shares respectively of the brother's son and second widow?

Of a brother's son with two widows.

R. On the death of the childless person above-alluded to, his property, after defraying his necessary expences, will be distributed among his two widows and his brother's son according to their legal shares, that is to say, the immoveable property will be made into eight shares, of which the widows will share a fourth or two, between them,* and the remaining six will go to the brother's son as residuary. The sale by the second widow, after the death of the first, is only valid for her own share, and not for the share which appertained to the first widow, nor for the six shares which are the right of the brother's son, who is proprietor of his own share. On the death of the first widow, if she had not disposed of her share by gift or sale, and if she did not leave any legal heir, her share will go to the Public Treasury.†

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* See Prin: Inh: 14.

† This is an example of the Third Principle of Distribution (77). To give the widows their fourth share to which they are entitled, the property must have been made originally into four parts. But one (the fourth part of that number) cannot be divided between the two widows without a fraction, and on a comparison of the number of the heirs so situated, and the share allowed to them, they appear to be *Mootubayun* or prime. Thus: 1=2--1—In which case the rule is, that the number of the original division must be multiplied by the number of heirs who cannot get their portions without a fraction. Thus: $4 \times 2 = 8$.

CASE LIV.

Q. A person dies, leaving two daughters, a son's son and a daughter of a son. Under these circumstances, into how many shares will his property be made; and in what proportions will the persons above-specified be entitled to share respectively according to the Law of Inheritance?

Of two daughters with a son's son and a son's daughter.

R. Under these circumstances, after providing with moderation for the funeral expences of the deceased, after the liquidation of his debts and the payment of his legacies, to the extent of a third of the estate, the remainder will be made into nine shares, of which the daughters will receive two-thirds* or three shares each, the son's son two shares, and the son's daughter one,† in virtue of their right as residuaries.

CASE LV.

Q. A person executes a document, declaring his nephew to be his representative in proprietary right. Will this document in favor of the nephew be available according to Law? If not available, and the nephew be not entitled under it to succeed to all the property left by his uncle, in what proportions will the property be distributed among the surviving claimants, being a mother, three sisters, a brother, (who is a defendant in this cause), a widow and a father-in-law?

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* See Prin: Inh: 17.

† Third Prin: of Dist: (77). The legal shares in this case being two-thirds, the property should have been made originally into three shares, but of this number, after the daughters have taken their two-thirds or two, there remains only one to be divided among the two other claimants, who must however be counted as three (a son receiving twice as much as a daughter). But 1 (the remaining share) and 3 (the claimants) being prime, the number of the original division must be multiplied by the number of such claimants. Thus: $3 \times 3 = 9$.

R. According to the Moohummudan Law, the document in question is of no validity, and cannot be available to confer any right of succession on the nephew, because it purports to constitute him the representative in proprietary right of the framer of it, in other words, it declares him in general terms to have the right to the entire property belonging to the framer of the document after the death of the latter. Such a declaration does not fall within any description of legal obligation, and has therefore no validity as to the creation of proprietary right. The heirs of the deceased being his mother, brother, three sisters and his widow, his father-in-law is excluded from the inheritance. His property will be distributed in the following manner: after the liquidation of his just debts the residue will be made into sixty shares, of which fifteen (a fourth)* will go to his widow, ten (a sixth)† to his mother, fourteen to his brother, and the remaining twenty-one to his three sisters or seven shares each.‡ The share of his widow, after her death, will go to her father or to her other lawful heirs.§

A document executed by a proprietor declaring another entitled to his property after his death, is null and void.

Of a widow with a mother, brother and three sisters.

CASE LVI.

Q. A person possessed of landed property, which he had obtained by gift, died about eight years ago, leaving a widow, four daughters, a brother and two sisters. His brother also died, leaving four sons, and one of his sisters died, leaving a daughter. The widow disposed of part of the property by sale. Is such sale on her part legal, and are the claimants who are the represen-

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* See Prin: Inh: 14. † 33. ‡ 22.

§ Third Prin: of Dist: (77). Where an eighth and a sixth occur together the division (see Prin: Inh: 65) must, originally, be into twelve, of which when the widow has taken her fourth share or three, and the mother her sixth share or two, there remain but seven to be divided among the other claimants, who must be counted as five. But five and seven are prime. Therefore the number of the original division must be multiplied by the number of claimants who cannot get their portions without a fraction. Thus: $12 \times 5 = 60$.

tatives of the deceased's brother and sister, entitled to any shares; and if so, to what shares in right of the persons whom they represent?

Case of sale by a widow of her husband's property, to which there are other legal claimants.

R. It appears that the widow has been in possession of her husband's property from the time of his death, and has disposed of a part of it by sale. The claimants come forward, urging their right of inheritance to the estate of the deceased proprietor, and they admit that the person in possession is his lawful widow. Now according to the usage of this part of the Country (Burdwan) the dower is never fixed at an amount falling short of six hundred and fifty rupees, and from the smallness of the estate it is incredible that this sum should have been realized therefrom. The claim of inheritance cannot be maintained until the debt due on account of dower shall have been liquidated. Supposing this to have been done, the estate should have been distributed among the immediate heirs of the original proprietor in the following manner: It should be made into ninety-six parts, of which the widow should receive an eighth* part or twelve shares, the daughters two-thirds† or sixty-four shares, the brother ten shares, and each of the sisters five‡ shares. Their representatives would take the same. Regarding the sale of the widow, it may be observed that she is a sharer by Law as well as a creditor of the estate, and therefore should the purchaser agree to the arrangement, the sale may be upheld as valid, so far as respects that part of the property which belongs to her in right of inheritance.§

Of four daughters with a brother, two sisters, and a widow.

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* See Prin: Inh: 14. † 17. ‡ 22.

§ Third Prin: of Dist: (77). The shares in this case being an eighth and two-thirds, the original division must, agreeably to Prin: Inh: 66, be into twenty-four, of which when the widow has taken her eighth or three, there remain twenty-one to be distributed among the four daughters, which obviously cannot be done without a fraction; but on a com-

CASE LVII.

Q. It appears that the proprietor of an estate, the succession to which is now disputed, had four sons and two daughters. One of the sons died during his father's life-time, leaving a son. On the death of the proprietor, leaving a widow, three sons, two daughters and the grand-son above-mentioned, to what proportions of his estate will the survivors be entitled?

Of three sons with two daughters and a widow.

R. The estate will be made into sixty-four parts, of which each son will take fourteen, each daughter seven* and the widow (an eighth)† eight parts. The grand-son, whose father, died during the life-time of his grandfather will be excluded from all participation in the inheritance.‡

CASE LVIII.

Q. The heirs of a deceased proprietor being his widow, his mother and his two sons, to what proportions of his estate are the individuals enumerated respectively entitled?

Of two sons with a mother and a widow.

R. In this case, agreeably to the Law of Inheritance, the property should be made into forty-eight parts, of

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parison of the number of the heirs so situated and the shares allowed to them, they appear to be *Mootubayun* or prime. Thus: 4 × 5=21—1; in which case the rule is that the number of the original division be multiplied by the number of heirs who cannot get their portions without a fraction. Thus: 24 × 4=96.

* See Prin: Inh: 3. † 14.

‡ Third Prin: of Dist: (77). The property must in the first instance have been made into eight parts, to give the widow her share (an eighth), and, after she has taken her share, there remain only seven to be divided among the other heirs who must be counted as eight, though there are only five (one male getting the portions of two females), but these numbers (7 and 8) are prime to each other—consequently the number of the original division must be multiplied by the whole number of heirs who cannot get their portions without a fraction. Thus: 8 × 8=64.

which the widow is entitled to six, the mother to eight, and the sons to the remainder.*

The shares of the heirs enumerated are as follows:—

Mother	Widow	Son	Son
8.	6.	17.	17.==48.

CASE LIX.

Q. A person dies, leaving two sons, two daughters and a widow. How should his landed property be distributed among these persons on his decease?

Claims preferable to inheritance.

Of a widow with two sons and two daughters.

R. On the death of the proprietor, his estate, whether real or personal, should in the first instance be applied to defray his funeral expences, in the second place to the discharge of his debts, and in the third place to the payment of his legacies out of a third of the residue of the property. An eighth† goes to the widow, when there are children, and what remains after this deduction should be divided between his two sons and his two daughters in the proportion of a double‡ share to the males.§

CASE LX.

Q. Abdool Rusheed died, leaving a widow, a daughter, and the two plaintiffs, who are his paternal uncles,

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* There being sons, the widow's share is an eighth, and the mother's share is a sixth; but it is a rule, that where among one set of sharers, one sharer is entitled to an eighth, and another to a sixth, or a third or two-thirds, the division must be into 24. But the eighth of 24 is 3, and the sixth is 4; consequently, after deducting 7 for the widow's and mother's shares, there remain seventeen to be divided between the two sons, which cannot be done without a fraction, in which case the proportion between the shares and the sharers is to be sought, thus: 2 + 8=17—1. The two numbers being *Mootubayun* or prime, the root of the case, or the number of the original division must be multiplied by the number of sharers, thus: 24 × 2=48. Third Prin: of Dist: (77).

† Prin: Inh: 14. ‡ 3.

§ This also is an example of the Third Principle of Distribution (77). The estate in this case should be made into forty-eight parts, of which the widow will be entitled to six, the sons to fourteen each, and the daughters to seven each.

descended from the same male ancestor as the deceased. In this case how will the property be distributed?

R. The widow will obtain an eighth; the daughter a moiety of the whole, and the remainder will be divided equally between the two plaintiffs.*

Of a widow with an only daughter and two paternal uncles.

CASE LXI.

Q. A person dies, leaving a widow, four sons of his brother, an uterine-sister, and a son of his uncle. One of these persons had got possession of all the property left by him, and had remained in the exclusive enjoyment of it for about twenty-five years. In this case, according to Law, will the property be shared by all the heirs or not? If it devolves on all of them, how will it be distributed among those individuals?

R. Under the circumstances stated, if the possession were acquired without right, according to Law, such occupancy will not operate as a bar to the claims of inheritance. After providing for such expences as are requisite before the partition of heritage, the remaining property will be made into sixteen parts, of which the sister will take eight shares, the widow four and the remaining four will devolve on his brother's sons, each taking one. The son of his uncle is excluded.†

Of a sister with a widow and four brother's sons.

CASE LXII.

Q. It appears in this case, that the wife having received a deed of dower from the husband at the time of marriage, died before him, leaving two sons. Her

* Thus the property will be divided into sixteen parts, of which the daughter will get eight, the widow two, and the paternal uncles three parts each. Third Prin: of Dist: (77).

† Third Prin: of Dist.

younger son subsequently died. Afterwards her husband, who had during his life-time remained in free and absolute possession of the real and personal property now in dispute, died, leaving behind him the elder of the two sons above-mentioned, his mother, and his four slave girls, one of whom is alledged to have been married to him: he left, also, a son by one of the said slaves. Subsequently to his death his mother departed this life. The question is, at the time of the decease of the husband who were his heirs? and how should his property be distributed according to law? If the mother had any right to the inheritance, how is her share to be disposed of after her death? and if the opinion to be delivered in this case should be at all affected by the fact of the validity or otherwise of the marriage of the slave girl, let it be delivered under both suppositions, leaving that issue to be determined by evidence?

Of a husband with children.

R. The wife in this case died, leaving two sons and a husband. Her property therefore, that is the debt due to her on account of dower, must be divided into eight shares.* Her sons will take three shares each, and her husband two shares or a fourth.† Afterwards on the death of her younger son his three shares will go to her husband, who is his father,‡ so that five shares out of the eight shares, due on account of the dower, revert to the husband, and the claim against him for so much is extinct. The right to the remaining three shares belongs exclusively to the elder son. The husband dying leaves as heirs his elder son, another son (by a slave girl), his mother, and one female slave, who claims emancipation and marriage. In the event of the marriage being good and valid, the estate left by the husband will be distributed into forty-eight shares, of which the sons

Of a father with a brother.

Of two sons with a mother and widow.

* Third Principle of Distribution (77). † 15. ‡ 21.

will get seventeen each, the mother eight shares (a sixth), and the wife (that is the married female slave) six shares (an eighth). In the event of the marriage not being good and valid, the estate left by the husband will be distributed into twelve shares, of which the mother will get two* shares and the two sons five each; but as the amount of the debt, specified in the deed of dower as due to the deceased wife, is immense, and exceeds one hundred thousand gold-mohurs, even after a deduction of ten-sixteenths, the claim of dower absorbs the whole estate left by the husband; and the satisfaction of such claim is preferable to that of inheritance. But the mother of the husband was entitled to an eighth of the estate in right of her husband, had a claim on the ancestrel property on account of her dower, and also was in actual possession and enjoyment thereof after the death of her son. As she acknowledged the son of the slave to be her grand-son, all her right and interest in the property, real and personal, should after her death be divided into two parts, and shared equally between the two sons.

Of two sons with a mother.

Claim of dower precedes inheritance.

CASE LXIII.

Q. A man dies leaving three widows, six sons and six daughters. How will his property be distributed amongst them?

R. It will be made into one hundred and forty-four shares of which the widows will get an eighth† or six shares each, the sons will get fourteen shares each, and the daughters seven shares each or half‡ the amount of the sons' shares.§

Of six sons with six daughters and three widows.

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* See Prin: Inh: 33. † 14. ‡ 3.

§ This is an example of the fifth Principle of Distribution (79), where there is a fractional division of an unit as to both sets of shares, and the number of one class of sharers equally measures the other. Thus: an

CASE LXIV.

Q. A person dies, leaving as his heirs a father, a widow, three sons and two daughters; but another woman and her two sons claim part of the property, she alledging herself to have been the wife of the deceased, and her sons stating themselves to be his offspring. There seems however to exist considerable doubt as to whether the marriage was ever celebrated. The acknowledgment of the deceased during his lifetime, and the mode in which he took care of the claimants, form the only evidence of the truth of their allegations. Under these circumstances, can the claimants in question legally be accounted the widow and sons of the deceased? and if so, into what number of shares should the estate be divided agreeably to the Law of Inheritance?

Acknowledgment of children by their parents.

R. If the deceased during his life-time acknowledged the parentage of those persons who now claim to be his sons; and after his death their mother make the same assertion, calling herself his widow, all these three persons will be his legal heirs. Agreeably to the *Viqaya*,—" Or if a person die, having acknowledged a

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eighth being the share of the widows, the property cannot be made into less than eight shares, of which they (the widows) are to take one; but one cannot be distributed among the three widows without leaving a fraction. Besides the widows, there are eighteen other claimants (supposing one son equal to two daughters, which is the mode of computation, the shares of the former being double those of the latter). It is obvious also that the remaining seven shares cannot be distributed among eighteen persons without leaving a fraction. Between each set of shares and each class of sharers there is a fractional division of an unit which is termed *Moo'ubayun* or prime. Thus: the first set compared with the first class of sharers is 1 $\times$ 2=3—1, and the second set compared with the second class of sharers is 7 $\times$ 2=18—4, and 4=7—3, and 3=4—1. But one class of sharers equally measures the other without a fraction, which is termed *Mootudakhil* or concordant; three being the measure of eighteen 3 $\times$ 6=18. The rule in this case is that the greater number 18 be multiplied into the root of the case. Thus: 18 $\times$ 8=144. I have not met with any case exhibiting an example of the Fourth Principle of Distribution, but in page 16, will be found an exemplification of the rule

certain child to be his son. If afterwards the mother declare the child to have been his son and herself to have been his wife, they both inherit." According to this supposition, after defraying the funeral expences and satisfying the debts and legacies, the estate of the deceased should be made into two hundred and eighty-eight parts, of which forty-eight should go to the father, eighteen shares to each of the two widows, thirty-four shares to each of the five sons and seventeen to each of the two daughters.*

Of a father with two widows, five sons, and two daughters.

CASE LXV.

Q. A person dies, leaving two widows, the one married by the ceremony of *Shadee*, the other by that of *Nikah*. By the former he left three sons and five daughters, by the latter two sons and one daughter. How will his property be distributed among the persons above-mentioned, and in what proportions?

R. The property will be made into one hundred and twenty-eight parts, of which the widows will take sixteen or eight† each, the sons seventy or fourteen each, and the daughters forty-two or seven each.‡

Of five sons with six daughters and two widows.

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* Fifth Principle of Distribution (79). Here in the first place the share of the widows (see Prin: Inh: 14) is one-eighth, and of the father (see Prin: Inh: 32) one-sixth; but where an eighth and a sixth occur together (see Prin: Inh: 66) the division must be originally by twenty-four, of which, after the widows have taken their eighth or three, and the father has taken his sixth or four, there remain seventeen to be distributed among the twelve other claimants (one son counting as two daughters). But this cannot be done without a fraction, nor can three be divided between the two widows without a fraction, and two and three are prime to each other, and so are twelve and seventeen; and having ascertained this result, the whole number of one set of sharers should be compared with the whole number of the other. Thus: $2\times6=12$, which being concordant, the rule is that the greater number must be multiplied into the number of the original division. Thus: $24\times12=288$.

† Prin: Inh: 14. ‡ 3. Fifth Principle of Distribution (79). The share of the widow is one-eighth (see Prin: Inh: 14): consequently eight is the least number of shares into which the estate should originally be divided. But after the widows have taken their eighth or one, there remain seven to be distributed among the sixteen other claimants (one son counting as

CASE LXVI.

Q. A person dies, leaving as his heirs four widows, eight sons and six daughters. How will his property be divided among these persons?

Of eight sons with six daughters and four widows.

R. After the satisfaction of just debts and other precedent claims, the residue of his property will be made into three hundred and fifty-two shares, of which forty-four will go to his widows or eleven shares to each, two hundred and twenty-four to his eight sons or twenty-eight shares to each, and the remaining eighty-four to his daughters or fourteen to each.*

CASE LXVII.

Q. A man dies, leaving as his heirs two widows, a mother, a daughter, three brothers and a sister. In this case into how many shares will his property be distributed, and in what proportions will the persons above-enumerated be entitled to inherit respectively?

Of a daughter with two widows, three brothers and a sister.

R. In this case the estate of the deceased will be distributed into three hundred and thirty-six shares, of

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two daughters), but this cannot be done without a fraction, nor can one share be divided among the widows without a fraction, and one and two are prime to each other, and so are seven and sixteen; and having ascertained this result, the whole number of one set of sharers must be compared with the whole number of the other. Thus: $2\times8=16$, which being concordant, the rule is that the greater number must be multiplied into the number of the original division. Thus: $8\times16=128$.

* This is an easy example of the Sixth Principle of Distribution (80). The share of the widows being one-eighth, the estate must in the first instance be made into at least eight shares, which number therefore is the root of the case. But the eighth of eight being one, it cannot be divided among the four widows without a fraction, and besides them there are twenty-two claimants (one male counting as two females). On a comparison of both sets of heirs with the number of their respective shares, they will be found to be prime. Thus: $1=4-3$, and $3=4-1$, and $7\times3=22-1$, and then the proportion between the numbers of the respective sets of heirs being found to be composit, thus: $4\times5=22-2$, the rule is that the measure of the first of the numbers (which is in this case two) be multiplied into the whole of the second, and the product into the root of the case. Thus: $2\times22=44\times8=352$.

which the widows will take their legal share of one-eighth,* being forty-two shares or twenty-one each, the mother will take her legal share one sixth† being fifty six shares, the daughter will take her legal share of one half‡ being one hundred and sixty-eight and the remaining seventy shares will be distributed among the brothers and sisters as residuaries, according to the known rule of a double share for the male, being twenty shares for each of the brothers and ten for the sister.§

CASE LXVIII.

Q. A person sues his father's widows, and his brother, to recover possession of half the property, real and personal, left by his deceased father. His father left two sons, a daughter and two widows. In what proportions are these persons respectively entitled to share the estate? The widow who is the defendant in this action claims the whole of the property in satisfaction of her dower.

Of two sons with a daughter and two widows.

R. In this case the estate will be made into eighty shares, of which one-eighth¶ or ten parts will go to the

* See Prin: Inh: 14. † 33. ‡ 16.

§ This case affords an example of the Seventh Principle of Distribution (81). The share of the wives being one-eighth and that of the mother one-sixth, the rule is (see Prin: Inh: 66) that the estate must be in the first instance made into 24 parts, which number therefore is the root of the case. But after deducting twelve for the daughter's half, four for the mother's sixth and three for the widows' eighth, there remain five only to be distributed among the seven residuary heirs (one brother counting as two sisters), which distribution cannot take place without a fraction. Neither can three be divided between the two widows without a fraction. Consequently there is a fractional division in two sets of heirs, and the shares and the sharers are in both instances prime to each other, thus: 2=3—1, and 5=7—2, and 2×2=5—1—in which case the rule is to ascertain the proportion between the numbers of the respective sharers (2×3=7—1) which is found to be prime or divisible by an unit only, and this being ascertained, the first of the numbers must be multiplied into the second and the product into the root of the case. Thus: 2×7=14×24=336.

¶ See Prin: Inh: 14.

widows by the rule of inheritance, that is to say, five to each widow; and, on the principle that the share of a male is double* that of a female, fourteen shares will go to the daughter and twenty-eight to each of the sons. But dower is like all other debts and should be satisfied before claims of inheritance. Therefore if the widow's claim be just, it should be satisfied before that of the heirs, and the residue afterwards should be distributed among them.†

CASE LXIX.

Q. Moohummud Tuqee, the husband of Hyatee Khanum, and grand-father of Mirza Mehdee, obtained a grant from the rulers of the country, confirming in his person the proprietary right to certain lands, which had formerly been the property of his father-in-law, Abdoo Soobhan, but which had been resumed after his death. In virtue of this grant, he became seized of the lands, and some time afterwards, having formally appropriated them to pious purposes, he executed a deed in favor of his wife, vesting in her the trust and possession of the lands so appropriated; but whether she obtained possession under that deed does not appear. After the death of Moohummud Tuqee, his son Ali Nuqee, (grand-son of Abdoo Soobhan) became seized of the lands, and after his death they came into the possession

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* See Prin: Inh: 3.

† This also is an example of the Seventh Principle of Distribution (81). The share of the widows, according to Prin: Inh: 14, being one-eighth, the estate should originally be made into eight parts, and after they have taken one as their eighth, there remain seven to be distributed among the five other claimants (one son counting as two daughters), which cannot be done without a fraction, neither can one share be divided between the two widows without a fraction, but one is prime to two and so is five to seven; and having ascertained this prime result, the whole of one set of sharers should be compared with the whole of the other. Thus: $2 \times 2 = 5 - 1$, which giving a prime result, the rule is that the first of the numbers be multiplied into the second and the product into the number of the original division. Thus: $2 \times 5 = 10 \times 8 = 80$.

of his widow Koolsoom Khanum and his son Mirza Mehdee. Now Hyatee Khanum, widow of Moohummud Tuqee, sues them, to recover the property, in virtue of the deed of trust and possession executed in her favor by her husband. Is the deed of trust valid, notwithstanding that it specifies possession, and that it is executed in favor of a female; and had Moohummud Tuqee, who obtained the grant of the lands, a right to appropriate the whole of them to pious uses, or only such part of them as may have fallen to his share by right of inheritance from his wife, who was daughter of Abdoo Soobhan, (the original proprietor) and mother of Ali Nuqee? If he had a right to appropriate a part only, is the deed of trust, conveying the whole, good and valid, as to the part which he had a right to appropriate?

Of an endowment of joint undivided landed property.

R. The proceedings do not clearly shew whether the lands in question were formerly the property of Abdoo Soobhan, and after resumption the right to them was confirmed in the person of Moohummud Tuqee, or whether he obtained the grant *de novo.* But it appears however from an acknowledgment of Moohummud Tuqee, which is on record, and it may also be collected from the tenor of the question, that Abdoo Soobhan was formerly proprietor of the lands, and that after resumption, the right to them was confirmed in the person of Moohummud Tuqee, by the ruling power. Under these circumstances, the estate must be considered to have belonged to Abdoo Soobhan, deceased; and to be divisible in the first instance among his heirs and their representatives, and ultimately between Moohummud Tuqee and Ali Nuqee, who are represented by Koolsoom Khanum and Mirza Mehdee. The legal shares of the parties are set forth in the subjoined table. The appropriation by Moohummud Tuqee of the whole of the lands, including the share of his son, to the support

of mosques and religious edifices, is not legal or valid; and according to the doctrine of Imam Moohummud, the appropriation of his own share even, from the circumstance of it's being undefined, is illegal. But according to Aboo Yoosuf, whose opinion is followed in this particular by many lawyers, the appropriation of his own share is legal; and the conferring the trust of the appropriation on a female, is universally allowed to be legal. It is advisable, in this instance, to follow the doctrine of Aboo Yoosuf; and to declare the appropriation by Moohummud Tuqee of his own share, to be legal, as well with a view to uphold his disposition, as to secure the rights of the other heirs, whom he by his act intended to exclude. Supposing the lands never to have been the property of Abdoo Soobhan, but to have been acquired *de novo* by Moohummud Tuqee, and supposing it not to appear, that his wife obtained possession of them under the deed executed by him, the appropriation, according to the doctrine of Moohummud, whose opinion in this particular is followed by many lawyers, is invalid; and on this supposition, the property left by Moohummud Tuqee will be distributed among his heirs according to their legal shares, which are set forth in the subjoined table. If in this case the doctrine of Imam Moohummud be followed, and the appropriation declared invalid, the heirs will not be excluded. If, on the other hand, the doctrine of Aboo Yoosuf be followed and the appropriation declared valid, the heirs will be excluded. Under all circumstances therefore it is better to adopt the opinion of Imam Moohummud.

Of an endowment, the appropriator not giving possession to the trustee.

Disposition of the property, supposing it to have descended from—

Abdoo Soobhan, deceased:

Of a son with two daughters.

Son	Daughter	Daughter
Moozuffer Hoosein,	Misree Khanum,	Hyatee Khanum,
2 shares.	1 share.	1 share.

Moozuffer Hoosein, deceased:

Sister	Sister
Misree Khanum,	Hyatee Khanum,
1 share.	1 share.

Of two sisters.

Misree Khanum, deceased:

Sister	Husband
Hyatee Khanum,	Moohummud Tuqee,*
	2 shares.

Son	Son
Ali Nuqee,	Husun Uskuree,
3 shares.	3 shares.

Of a husband with two sons and a sister.

And after the death of Hyatee Khanum—

Hyatee Khanum, deceased:

Husband	Sister's Son	Sister's Son
Moohummud Tuqee,	Husun Uskuree,	Ali Nuqee,
4 shares.	2 shares.	2 shares.

Of a husband with two sons of a sister.

Husun Uskuree, deceased:

Brother	Father
Ali Nuqee,	Moohummud Tuqee,
	5 shares.

Of a father with a brother.

TOTAL.

Ali Nuqee, 5 shares. Moohummud Tuqee, 11 shares.

Disposition of the property, supposing it not to have descended from Abdoo Soobhan, and Hyatee Khanum to survive her husband—

Moohummud Tuqee, deceased:

Wife	Wife	Wife
Hyatee Khanum,	Hinda,	Zeinub,
5 shares.	5 shares.	5 shares.

Of a son with three widows and three daughters.

* Moohummud Tuqee married two sisters, namely, Hyatee Khanum and Misree Khanum, both daughters of Abdoo Soobhan. It may here be observed that although a man is prohibited by Law from marrying his wife's sister, his wife being alive, yet that after her decease he may lawfully marry her sister.

Son	Daughter	Daughter	Daughter
Ali Nuqee,	Khudeeja,	Fatima,	Ayesha,
42 shares.	21 shares.	21 shares.	21 shares.

Or converted into cash, the shares of the females will be ten annas eight gundas in the rupee, and the share of Ali Nuqee will be five annas twelve gundas.*

CASE LXX.

Q. A man dies, leaving a widow, a mother and a sister. In this case how will his estate be distributed?

Of a sister with a mother, and a widow.

R. Agreeably to the doctrine in cases of increase, the estate of the deceased should be made into thirteen shares, of which his widow is entitled to three, his sister to six, and his mother to four.†

CASE LXXI.

Q. A woman dies, leaving as her heirs a daughter, a mother, a father and a husband. Under these circumstances to what proportion of the dower of the deceased woman is her mother entitled?

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* This is a simple example of the Seventh Rule of Distribution (81), where there is a fraction remaining in the shares of two sets of sharers, and on a comparison between the respective numbers of the sharers, they appear to be prime to each other. Thus the share of the wives being one-eighth, the property must be made into eight shares at least, of which the wives will take one share; but one cannot be divided among three without a fraction, nor can the seven remaining shares be divided among the other five (three daughters and one son whose share being double is counted two) claimants without a fraction. But three (the number of the wives) is prime to five (the number of the other claimants). In such case the rule is that the one number of sharers be multipled by the other, and the product multiplied into the root of the case. Thus: $3 \times 5 = 15 \times 8 = 120$.

† This case affords an example of the doctrine of the increase. See Prin: Inh: 68 and 90. In the first place the property should have been made into twelve parts, according to Prin: Inh: 65; the shares of the claimants being a fourth, a third and a half. But when the widow has taken her fourth or three, and when the mother has taken her third or four, there will not remain half for the sister; and the number 12 must therefore be raised to 13, to enable all the heirs to obtain their respective portions.

R. The entire estate of the deceased woman, whether consisting of dower or of other property, should be made into thirteen parts, of which her mother is entitled to two, her father to two, her husband to three, and her daughter to six shares.*

Of a daughter with a mother, a father, and a husband.

CASE LXXII.

Q. A person dies, leaving two daughters begotten by himself on a slave girl, who also survives him. In this case is the slave girl, who is the mother of those daughters, entitled to any portion of the estate of her master? If so, how will the property be shared among the three individuals above-named?

R. Under these circumstances the female slave has no right to any share in the estate. Should the above question contain a correct exposition of the state of the family, the property must first be applied to defray the expences of the burial of the deceased, then to the discharge of his just debts; and if there remain any surplus, it shall, according to the Divine Law, be made into three parts, of which two will go to the daughters or one share to each, and the remaining one to the residuary heir, if there be any. On failure of such residuary, the whole property, in virtue of their legal shares and of the return, will be vested in the daughters, as is laid down in the Law tracts treating of such succession. In the *Sirajya,*—"Impediments to succession are four; 1st, servitude, whether it be perfect or imperfect." The expressions "perfect" indicate absolute slavery, and "imperfect" indicate *Moodubbirs* and *Mookatibs,* and those who are mothers of offspring. "Daughters begot-

Of two daughters and their mother, who was the slave of the deceased proprietor.

* This case affords another example of the doctrine of the increase. See note to case 70.

ten by the deceased take in three cases—half goes to one only and two-thirds to two or more."*

CASE LXXIII.

Q 1. A woman dies, leaving a sister, a husband, several brothers' sons, a paternal uncle's son, and children of her other sisters. Under these circumstances, on whom, among the persons enumerated, will her property devolve on her death?

Of nephews, nieces and cousins with a husband and sister.

R 1. Her brothers' sons, her paternal uncle's son, and the children of her other sisters, have no right of inheritance while the sister and husband of the deceased are living. The property therefore must be divided into two parts, one-half of which will go to the sister and the other to the husband.

Q 2. The husband dies, leaving only one sister and no other sharers or residuaries. On whom will his property legally devolve under such circumstances?

Of a sister, being the only heir.

R 2. As the sister is the only claimant, there being no other sharer nor residuary, she will take the whole property left by her brother, (whether derived to him from his wife or otherwise) half in virtue of her legal share, and half for the return.†

CASE LXXIV.

Q. On the death of Gholam Hoosein, his widow became possessed of his lands in proprietary right. She died, leaving an uterine sister, and a sister by the same

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* This case exemplifies the doctrine of the return. See Prin: Inh: 92. The legal share of the daughters is only two-thirds of the property, but there being no other heirs, they take the surplus third, which reverts to them.

† See Prin; Inh: 92.

father only. Will the lands, of which she died in possession, go to the persons above-mentioned, or will they devolve on the widow of Gholam Hoosein's brother or his brother's sons; and if so, to what proportions will they be entitled?

R. The widow of Gholam Hoosein having been in possession of the lands as proprietor, they will devolve, as a matter of course, on her uterine and half-sister by the same father, the former of whom will take three parts and the latter one.*

Of a half-sister by the same father with an uterine sister.

CASE LXXV.

Q. A man dies, leaving a widow and two daughters. What shares of his property will these persons take respectively?

R. The whole property will be divided into sixteen shares, of which two shares will go to the widow and seven to each of the daughters.†

Of a widow with two daughters.

* This case exemplifies the doctrine of the return. See Prin: Inh: 93. The property should originally have been made into six; the share of the half-sister by the same father only being one-sixth with an uterine sister, and the legal share of the uterine sister being one-half. See Prin: Inh: 23 and 27. But the sixth of that number (6) is one, and the half is three. Consequently by making the entire estate into four parts and giving three to the uterine and one to the half-sister, each will obtain her proper share.

† This also is a case in which the doctrine of the return is exemplified. There being one of the heirs not entitled to a return, the calculation has been made agreeably to that laid down for the third class of persons entitled to share in the return. See Prin: Inh: 94.

Thus the smallest number into which the estate can be divided, consistently with giving the widow (who is not entitled to a return) her share of the inheritance (which is an eighth) is eight; but after she has taken her share, there remain seven to be divided among the heirs entitled to a return, which obviously cannot be done without a fraction. In this case the proportion between the number of those entitled to a return and of the number of shares left for them must be ascertained. Thus: $2 \times 3 = 7 - 1$, which giving a *Mootubayun* or prime result, the number eight, into which the estate was originally divided, must be multiplied by the whole of the number of those entitled to a return. Thus: $8 \times 2 = 16$. It should here be observed that neither the husband nor wife have any legal claim to the return, and when they are associated with other heirs, the surplus reverts exclusively to such heirs.

CASE LXXVI.

Q. A person died, leaving a mother, a wife and two daughters of his uterine brother. In what proportions will his patrimonial property be distributed among the claimants above-enumerated?

Of a widow with a mother.

R. The whole estate of the deceased, after defraying the necessary expences, should be made in the first instance into twelve* parts;—but being a case in which the return operates, the twelve parts should be reduced to four, to one of which the widow is entitled and the mother will take the remaining three as her legal share, and on account of there being no other residuary heir, as the return also. The daughters of the uterine brother of the deceased are enumerated among the distant kindred, and they can never take any share of the property so long as there is a legal sharer.

Of brothers' daughters with a widow and a mother.

CASE LXXVII.

Q. A person dies, leaving a widow and a daughter, the relation of which persons to the deceased is established. In what proportions will these two persons inherit the property left by him?

Of a widow with a daughter.

R. The property of the deceased will be made into eight parts, of which the widow will take one, and the daughter the remaining seven. This is on the supposition that the deceased left no residuary heirs. In the event of there being any persons of this description, the

* The mother's share being a third by Prin: Inh: 34, and the widow's a fourth by Prin: Inh: 14, the property should, by Prin: Inh: 65, be made into twelve parts; but being a case of return, it should be reduced to the smallest number of which it is susceptible consistently with giving the person excluded from the return her share of the inheritance, which being in this instance one-fourth, the property should be made into four. See Prin: Inh: 94.

daughter will take four shares only, and the remaining three will be made over to the residuary heirs.*

CASE LXXVIII.

Q. A woman who had a daughter by a former marriage, purchased some landed property with her own money, and procured the title deeds of it to be made out in her own name and that of her second husband. She continued in possession of the property during her life-time, and on her death, her second husband having taken possession, made it over by gift to his second wife, who on his death became seized accordingly. The daughter of the first wife and the second wife are now disputing about the proprietary right to the land. Under these circumstances, which of them are entitled to it,—and if both, in what proportions? and had the husband any right to make over to his second wife all the property, notwithstanding there was a daughter of his first wife living?

Property purchased by a woman with her own money is exclusively her own, notwithstanding the insertion of her husband's name in the title deed.

R. If the landed property, the title deed for which was made out in the name of herself and of her husband, was purchased by the woman with her own money, such property must be considered exclusively hers; because, it is a maxim in Law that regard is had to the real and not to the nominal state of the case. According to this supposition the husband had no right whatever to make over the property to his second wife by gift, and, supposing there to be no other

* There being a child, the share of the widow is one-eighth, and the daughter being the only child, her legal share is half of the whole property; but as neither the wife nor the husband are entitled to any return, it is requisite that the three surplus shares should revert to the daughter if there be no other residuary heirs. If there be any, they of course take the surplus three shares, and the daughter obtains only her legal share, which is one-half or four parts out of eight. See Prin: Inh: 94. The smallest number of shares into which the estate can be divided, consistently with giving the widow her share, is eight.

heirs, it should, on the death of the first wife (who was the proprietor), have been made into four portions, of which three belonged to her daughter by the former marriage and one to her second husband.*

Of a daughter with a husband.

CASE LXXIX.

Q. Moohummud Wasil had three wives. By his first wife (Mussummaut Fuhmeeda) he had a son, named Ruhm Ali, and a daughter named Fyzoonisa; by his second wife he had a daughter, named Buhorun, and by his third wife a daughter, named Soopun. After his death the daughter (Soopun) of his third wife died. Qasim Ali, the son of Soopun, died before her. The daughter of Qasim Ali (Durgahin), that is to say, the grand-daughter of Soopun, is living. Ruhm Ali died, leaving a widow, who is living; his sister Fyzoonisa, and Buhorun the daughter of Moohummud Wasil's second wife, are living also. Under these circumstances, how will the property be distributed among them?

Case of a son's widow with two daughters and the daughter of another

R. Supposing Ruhm Ali to have died before Mussummaut Soopun, the whole property left by Moohummud Wasil will be distributed into seven hundred and twenty† shares, of which two hundred and seventy-two parts,

* This is an example of the doctrine of the return agreeably to that laid down for the third class of persons entitled to share the return. See Prin: Inh: 94.

† This is a case of vested inheritance—no distribution of the property having taken place during the life-time of the persons who successively died; and the following is one method by which the calculation may be arrived at:—

SKETCH OF THE FAMILY.

Moohummud Wasil, deceased:

Wife,		Wife,	Wife,
Daughter,	Son,	Daughter.	Daughter,
(Fyzoonisa.)	(Ruhm Ali)—wife.		Son,
			Daughter.

On the death of Moohummud Wasil his heirs are his three widows, his three daughters and his son. Now the widows get one-eighth of the property where there are children, as in this instance. To give them their share, and at the same time to give the son a share double that of

the share of Ruhm Ali, will go to his widow; one hundred and ninety-five parts will go to Mussummaut Buhorun, and one hundred and seventy-five parts will go to the sister of Ruhm Ali, daughter of Mussummaut Fuhmeeda; and seventy-eight shares to Mussummaut Durgahin. Supposing on the other hand Ruhm Ali to

daughter's son, the proprietor's son having died before his deceased sister and her son.

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the daughters without leaving a fraction, it is necessary to find out the smallest number which will give that result. It is obvious that eight will not, but as 1 is to 8, so is 15 to 120. Thus the widows will each get five shares, altogether fifteen shares or one-eighth of 120. The son will get forty-two shares, or double that of each of the daughters. On the death of the second and third widows their shares will go to their daughters, who will thus have twenty-six shares each. On the death of the first widow her five shares should have been divided between her son and daughter in the proportion of two to one; but her whole property consisting of five shares, it is impracticable to distribute it in this manner without a fraction. A higher number must therefore be sought. As 1 is to 5, so is 6 to 30, of which the son will be entitled to 20, and the daughter to 10. On the death of the son his whole property goes to his widow in satisfaction of dower. On the death of the daughter of the third widow, her property should have been divided into four parts, of which two would go to the daughter of her son, and one to each of her half-sisters. But, her whole property consisting of twenty-six shares, it is impracticable to distribute it in this manner, without leaving a fraction. A higher number must therefore be sought. As 1 is to 26 so is 6 to 156. Of this number seventy-eight shares will go to the grand-daughter, and thirty nine to each of the half-sisters. But it having been found necessary to make an increase with respect to one share, it becomes necessary to increase all the shares proportionally. Thus: as 1 is to 120 so is 6 to 720. Thus the share of the widow of Ruhm Ali will be $42 \times 6 + 20 = 272$. The share of Buhorun will be $26 \times 6 + 39 = 195$, and the share of Fyzoonisa will be $21 \times 6 + 10 + 39 = 175$. The remaining seventy-eight shares go, as was before stated, to the grand-daughter. On this calculation it is supposed, that the distribution did not take place until after Ruhm Ali's death, and that he died before his half-sister Soopun, which circumstance (as he himself could not inherit from Soopun) precludes his widow from a share of her property.

But in the event of Soopun's dying before Ruhm Ali, her grand-daughter will get half and the remainder will be distributed between her two half-sisters and her half-brother (Ruhm Ali) in the proportion of two to one to the brother; but Soopun's share consisting of twenty-six, it is plain that this distribution cannot be made without leaving a fraction. A higher number must therefore be sought. As 1 is to 26 so is 12 to 312. Of this number one hundred and fifty-six shares will go to the grand-daughter, seventy-eight to the half-brother, and thirty-nine to each of the half-sisters. But it is necessary to increase the other shares proportionally. Thus: as 1 is to 120 so is 12 to 1,440. The share of Ruhm Ali and consequently of his widow, will then be $42 \times 12 + 40 + 78 = 622$. The share of Buhorun will be $26 \times 12 + 39 = 351$. The share of Fyzoonisa will be $21 \times 12 + 20 + 39 = 311$. The remaining one hundred and fifty-six shares go, as was before stated, to the grand-daughter.

The above is not a very scientific process, and would in most instances involve greater trouble than a recourse to the prescribed rules, for examples of which see the following cases and their annotations.

have died after Mussummaut Soopun, the property will be distributed into one thousand four hundred and forty shares, of which six hundred and twenty-two parts, the share of Ruhm Ali, will go to his widow, in the event of so much having been assigned in dower; three hundred and eleven parts will go to the daughter of Mussummaut Fuhmeeda; three hundred and fifty-one parts will go to Mussummaut Buhorun, and one hundred and fifty-six parts to Mussummaut Durgahin, the daughter of Qasim Ali, son of Soopun.

And if the son died after his deceased sister and her son.

CASE LXXX.

Q. A proprictor of a landed estate dies, leaving a son, a daughter, and a half-brother by the same father only. After his death the son also dies childless; and the daughter, during the life-time of her paternal half-uncle, takes possession of the entire estate. Is she, under these circumstances, entitled to the whole, or to what part?

Of a daughter, with son and uncle, the son dying before distribution.

R. Under these circumstances, the share of the daughter is two-thirds, and that of her paternal half-uncle one-third, that is to say, the property will be distributed into three parts, of which two will go to the former, and one to the latter as residuary heir.*

* This is a simple example of the doctrine of Vested Inheritance (see Prin: Vest: Inh: 96, 97, 99). At the distribution which should have taken place on the death of the original proprietor, his brother (see Prin: Inh: 21) was not entitled to any part of the property left by him, there being a son. His property should then have been made into three parts, of which his son was entitled to two and his daughter to one. On the death of the son, his two shares should be compared with the number of shares into which it is requisite to make his estate, which is in this case two, the sister's share (see Prin: Inh: 23) being one moiety, and the other moiety going to the paternal half-uncle (brother of the original proprietor) as residuary heir. Two and two are concordant, but the measure of the number of shares being half or only one, the multiplication directed in Prin: 99 is of course needless.

CASE LXXXI.

Q. A woman died, leaving as her heirs four daughters, one son, and a husband. The son died previously to any distribution of the property, leaving his four sisters and his father. Under these circumstances, how will the surviving heirs, being the husband and four daughters, share the property?

Case of a son, four daughters and a husband, the son dying before the distribution.

R. According to law, if the whole property belonged to the deceased woman, it should, in the first instance, have been applied to her funeral expences; then to the payment of her legacies out of a third of the residue, and after such payment, if there remained any surplus, it should have been made into eight shares, of which four should go to her husband, and the remaining four to her four daughters or one share to each of them.*

CASE LXXXII.

Q. 1. A person dies, having divided his estate equally between his son and daughter, during his life-time: afterwards the son dies, leaving his sister and a wife. Under these circumstances, will his sister inherit; and what share of his property?

Of a sister with a widow.

R. 1. According to Law, the estate of the second deceased, that is to say, of the son, will be made into

* At the distribution, which should have taken place on the death of the original proprietor, her heirs being her husband, her son and four daughters, her property should have been made into eight parts, of which the husband was entitled to two shares, her son to two, and her four daughters to the remaining four shares or one share each.

At the distribution which should have taken place on the death of the son, his sole heir was his father, who was entitled to take his two shares which he inherited from his mother, without making any provision for his sisters out of it.

Consequently the property should be made into eight parts, of which the husband will take four, that is to say, two which he inherited from his wife, and the other two from his son, and the daughters the remaining four or one share each, which they inherited from their mother.

four shares, of which one will go to the widow and the remaining three to the sister of the deceased.

Q. 2. Supposing the first person to have died, without having made any division of his estate, leaving a son and daughter, and the son to die subsequently, leaving a wife, the property still remaining undivided; how much of the property will devolve on the son's wife, and how much on the daughter?

Of a daughter with a son's widow, the son dying subsequently to his father.

R. 2. In the first instance, the property of the first deceased will be made into three shares, of which two belonged to the son and one to the daughter. Afterwards of the four shares belonging to the second deceased (the two shares of the son having been raised to four) three will go to his sister and one to his wife. Therefore, the whole estate of the first deceased should be made into six parts, of which one should be awarded to the widow of his son, and five to his daughter.

Q. 3. Supposing the wife of the second deceased to have had a daughter by her husband, which daughter died at the age of five years. Under these circumstances, to what proportion of the property will such daughter be entitled? and after her death, on whom will her share devolve?

Of a daughter with a son's widow, the son dying subsequently to the father, but leaving a daughter, who is also dead.

R. 3. Under the circumstances stated, the property of the first deceased will be made into three shares, of which the son will take two and the daughter one; and on the death of the son his two shares will be raised to eight, of which one will go to his widow, four to his daughter, and three to his sister; and on the death of the daughter, the four shares appertaining to her will devolve on her mother. The whole estate of the first deceased, therefore, should be made into twelve parts,

of which five should be awarded to the widow of his son and seven to his daughter.*

CASE LXXXIII.

Q. A person dies, leaving his wife A, three sons B, C and D, and three daughters E, F, (by his wife A) and G by another wife. After his death, and before the property is distributed, his widow A, two of his sons B and C, and one of his daughters G, successively die. The

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* These questions afford very easy examples of cases of vested inheritance.

At the first distribution, the estate should have been divided into three parts, to give the son twice as much as the daughter. At the second distribution the estate of the son should have been made into four parts, the share of the wife being one fourth. But, being a case of vested inheritance, the proportion must be ascertained between the number to which the deceased son was entitled and the number into which it is necessary to divide the estate. Thus: $2\times2=4$, which agreeing in 2, the rule is (see Prin: Vest: Inh: 99) that the number of the shares of the original division (aggregate and individual) be multiplied by half the number of the portions of the second class of heirs, and these last by half the number of shares to which the deceased was entitled, (which being in this case only one, multiplication is needless.) Thus: $3\times2=6$, of which the widow will take one and the daughter 5, according to this table:

PROPOSITUS $3\times2=6$.

A Son, 4. — B Daughter, 2.

Son 4.

C Son's widow, 1. — B Sister, 3.

So also, in the third question, at the second distribution, the estate of the son should have been made into eight, the share of the widow being one-eighth and of the daughter one-half, but 2 and 8 also agree in 2, and agreeably to the Principle quoted in illustration of the answer to the former question, 3 must be multiplied by 4. Thus: $3\times4=12$, of which the son's sister takes 7, 4 in right of her father and 3 in right of her brother, the son's daughter 4 as her legal share of half, and the son's widow 1 as her legal share of one-eighth. On the third distribution the whole estate of the daughter goes to the mother, and the sister's share is not increased: according to this table.

PROPOSITUS $3\times4=12$.

A Son, 8. — B Daughter, 4.

A Son 8.

B Sister, 3. — D Daughter, 4. — C Widow, 1.

surviving heirs therefore are D, E and F. In what manner, and in what proportions, will the property of the original proprietor be distributed among them?

Case of a widow, three sons, three daughters and the daughter of another wife; and the widow, two sons, one daughter, and the daughter of the other wife dying successively.

R. It will be made into one thousand seven hundred and twenty-eight shares, of which D will get eight hundred and sixty-four shares, and E and F four hundred and thirty-two each. The following table will exhibit the manner in which the surviving heirs succeed to the interests vested in them by the death of their relations, who died subsequently to the original proprietor, but previously to the distribution being carried into effect.

$72 \times 8 = 576 \times 3 = 1728.$

Of three sons with three daughters and a widow.

A.	B.	C.	D.	E.	F.	G.
9.	14.	14.	14.	7.	7.	7.===72.
	112.	112.	112.	56.	56.	56.
		336.	336.	168.	168.	168.

A,

Deceased.

Of three sons with two daughters.

B.	C.	D.	E.	F.	G.
2.	2.	2.	1.	1.	0.===8
18.	18.	18.	9.	9.	
	54.	54.	27.	27.	

B,

Deceased.

Of two brothers with two sisters.

C.	D.	E.	F.	G.
2.	2.	1.	1.	0.===6.
130.	130.	65.	65.	0.

C,

Deceased.

Of a brother with two sisters.

D.	E.	F.	G.
2	1.	1.	0.===4.
260.	130.	130.	

G,

Deceased.

D.	E.	F.
84.	42.	42.

Of a half-brother and half-sisters.

TOTAL.

D.	E.	F.
864.	432.	432.*

CASE LXXXIV.

Q. A person dies, leaving two sons, who are uterine brothers, and who divide the paternal estate equally, each retaining possession of his own share. Some

* This case affords a good illustration to the rule respecting the succession to vested interests. With a view to distribute the property of the *propositus*, in the first instance, recourse must be had to the Third Prin: of Dist: (77). For the widow having a right to one-eighth, it is evident that the property cannot be made into less than eight shares; but besides her there are nine claimants, one son being counted as two daughters, and after her eighth is withdrawn, it is obvious that the remaining seven shares cannot be distributed among the nine claimants, without a fraction. It consequently becomes necessary to find the proportion between the sharers and the shares, which appears to be, that they are divisible by an unit only, or, that they are, what is termed, *Mootubayun* or prime. Thus: $7=9-2$ and $2\times3=7-1$, in which case the rule is, that the number of sharers must be multiplied into the total number of shares. Thus: $9\times8=72$, the product required.

Among the second class of sharers, the first rule of distribution applies. The step-daughter gets nothing, and by making the property into 8, (the number of sharers, a male being counted for two females,) it may be distributed without a fraction. But as the property of the widow was not distributed at the time of her death, it is necessary to find out the extent of the vested interest, to which each heir is entitled: it is requisite that the proportion be ascertained between the aggregate of their shares and the amount to which the widow was entitled at the preceding distribution, which is found to be 9. Thus: $8=9-1$. These numbers therefore are divisible by an unit only or are *Mootubayun*, in which case the rule is (See Prin: Vest: Inh: 98) that the aggregate and the individual shares of the first class should be multiplied by the aggregate of the shares of the second class. Thus: $72\times8=576$, and $14\times8=112$, and $7\times8=56$, after which the individual shares of the second class must be multiplied by the amount to which the widow was entitled at the preceding distribution. Thus: $2\times9=18$ and $1\times9=9$.

Among the third class of sharers also, the first rule of distribution applies for the same reasons; and in order to ascertain the extent of the vested interest of each heir, the same process must be had recourse to.

years subsequent to the division of the inheritance the younger son dies, leaving a widow and four daughters. The widow, on the death of her husband, takes possession of his property, which she retains for several years, and no distribution of her husband's property took place during her life-time. Of the deceased's daughters three are married and one continues unmarried. Afterwards the widow dies; but four or five years prior to her death her husband's brother and his son and grandson took possession of the property left by her husband and retained the exclusive enjoyment of it. It does not appear whether the possession was obtained forcibly or by the consent of the widow. All the four daughters are still living, and one of them now lays claim to a fourth part of the property left by her deceased father, bringing her action against her elder sister, who is the wife of her uncle's son, against her uncle's son, and

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Thus B the deceased had 112 shares at the first distribution, and 18 at the second,—total, 130; but the aggregate of the sharers of the present class is 6. The proportion between these two numbers is, that they agree in 2, or are, as it is termed, *Mootuwafiq* or composit. Thus: 6 × 21=130—4 and 4=6—2, in which case the rule is (See Prin: Vest: Inh: 99) that the aggregate and individual shares of the first class and the individual shares of the second class (as produced by the preceding results,) should be multiplied by half the sum of the shares of the third class. Thus: 576×3=1728, and 112 × 3=336, and 56 × 3=168, and 18×3=54, and 9×3=27, after which the individual shares of the third class must be multiplied by half the amount to which B was entitled at the preceding distribution. Thus: the half of 130 is 65, and 65×2=130, and 65×1=65.

Among the fourth class also the same rules apply. Thus C the deceased had 336 at the first distribution, 54 at the second, and 130 at the third. Total 520 but 4× 130=520, and the proportion is, that they agree in 4, or are, as it is termed, *Mootudakhil* or concordant, in which case the rule is (See Prin: Vest: Inh: 99) that the aggregate and individual shares of the first class, and the individual shares of the second and the third classes, should be multiplied by a fourth of the sum of the shares of the fourth class. But one being the fourth of 4, multiplication is needless—after which the individual shares of the fourth class must be multiplied by a fourth of the amount to which C was entitled at the preceding distribution. Thus the fourth of 520 is 130, and 130 × 2=260, and 130 × 1=130.

G dying, of her 168 shares her half-brother will take 84, and her half-sisters will take 42 each. Thus the survivor D will receive 84 + 260 + 130 + 54 + 336=864, and E will receive 42 + 130 + 65 + 27 + 168=432, and F will receive 42 + 130 + 65 + 27 + 168=432.

against his grand-son, who are in possession. According to the Moohummudan Law, is the claimant entitled to a fourth part of her parents' property or to any proportion less than a fourth? and supposing her to have the right, is it fit that, she being married, the action should be brought in her name, or in that of her husband?

Of a brother with a widow and four daughters, the widow dying before the distribution.

R. The original division of the estate between the two brothers was correct and proper. Now that disputes have arisen regarding the succession, the property of the deceased brother must be parcelled out in legal portions among the heirs, and for this purpose must be made into ninety-six shares, of which seventy-six will be allowed to the four daughters and twenty to the brother, and the share of each daughter, whether married or unmarried, will be nineteen. Consequently the claimant is entitled to nineteen out of ninety-six shares. It is a matter of no consequence whether the present possessors obtained the property by fair or by foul means; as the law recognizes no proprietary right for which some title cannot be shewn, such as acquisition by gift or the like, which does not here appear to have existed and such possession cannot bar the claimant's right. The husband of the claimant cannot under any pretence interfere in urging the claim preferred by her to her parents' property, the proprietary right to which is solely vested in herself.*

Suit by a married woman.

* This is a case of vested inheritance. The division of the deceased brother's estate originally should have been by 24, according to Prin: Inh: 66, but as the widow died before distribution, the number of shares to which she died entitled should be compared with the number of her heirs. Her shares amounted to 3 and her heirs' to 4; but these being compared give a *Mootubayun* or prime result, in which case the rule is (see Prin: Vest: Inh: 98) that the number of shares into which the property should first have been distributed be multiplied by the number of the heirs of the deceased. Thus: $24 \times 4 = 96$, of which number the daughters succeed to 64 or two-thirds, in virtue of their own right of inheritance, and to 12 or one-eighth, in right of succession to their mother.

CASE LXXXV.

Q. A person dies, leaving two wives, four sons and two daughters; but the distribution of his estate did not take effect until after the death of his two wives and one of his daughters. By his first wife he had only one son, and by his second wife he had one son and two daughters—his other two sons were the offspring of another woman. The death of the first wife occurred before that of the second, and the death of the second before that of the daughter, who left a husband. Under these circumstances, into how many shares is the estate to be made, and to what proportions of it will the claimants be entitled respectively?

Of four sons with two daughters and two widows.

R. In the first place the property of the deceased is to be made into eighty shares, of which one-eighth or ten shares will go to the widows, and they will take five each. The male issue will take a share double that of the female. Thus the sons will get fourteen shares each and the daughters seven each. On the death of the first widow her only son will be the sole heir to her property. The half-brethren by the same father only, are excluded from participation. On the death of the second widow her five shares (being multiplied by the number of shares into which they must be distributed) will be increased to twenty, of which her son will take ten and her daughters five each, and the shares of the preceding results will be multiplied by four, the number of sharers of the present class. Thus the share of the son on the death of the first widow: $5\times4=20$, and so with the shares of the sons and daughters on the death of the father: $14\times4=56$ (son's share); $7\times4=28$ (daughter's share), and the total number of shares $80\times4=320$. On the death of the daughter her property, which consists of thirty-three shares, will be made into one hundred and ninety-eight, of which her husband will be entitled to one-

Of a son with step-sons.

Of a husband with a brother and sister.

half or ninety-nine, and the other half will go to her whole-brother and her whole-sister in the proportion of a double share to the male. Thus the former will receive sixty-six and the latter thirty-three shares. The half-brothers will be excluded from the participation. The preceding results must again be multiplied by six, the number of shares of the present class. Thus: 10×6=60, and 5×6=30, and 20×6=120, and 56×6=336, and 28×6=168, and 28×6=168, and 320×6=1920,' and of this the son by the first wife will receive 336+120=456, the son by the second wife 336+60+66=462, the daughter by the second wife 168+30+33=231. The two other surviving brothers will be entitled to three hundred and thirty-six shares each, and the husband will take ninety-nine, as above stated.*

Of two wives, a son by the first, a son and two daughters by the second and two sons by another marriage; the two wives and one of the daughters dying successively, the latter leaving a husband.

* Among the first class of sharers an example is exhibited of the Fifth Principle of Distribution. The share of the two widows is one-eighth by law, consequently the property must be made into eight shares at least and eight must be assumed as the root of the case; but besides them there are ten other claimants (one son always counting for two daughters.) Here it will be observed that there remains a fractional division in the allotments of both the wives and the children, for one share cannot be given to the two wives without a fraction, and after their share is taken away the remaining seven cannot be distributed among the other ten claimants without a fraction. In this case, (after finding the proportion between the wives and their shares and the children and their shares (both of which prove to be *Mootubayun* or prime), it is requisite to find the proportion between the numbers of the sharers respectively, which proves to be *Mootudakhil* or concordant, in other words the smaller number exactly measures the greater. Thus: 2×5=10 when the rule is (see Fifth Prin: of Dist: 79) that the greater number be multiplied into the root of the case. Thus: 8×10=80. On the death of the first wife, her son being her only heir, no division takes place. On the death of the second wife (to conform to the rule that a male shall have a portion double that of a female) her property must be made into four shares, but being a case of vested inheritance, the proportion must be ascertained between the number of shares to which she was entitled at the first distribution and the number into which her property is made on her decease. These two numbers, 4 and 5, are prime or are divisible by an unit only, no third number measuring them both; in which case the rule is (See Prin: Vest: Inh: 98) that the shares (aggregate and individual of the preceding result) be multiplied by the aggregate of the shares into which the property of the last deceased is made. Thus: 80×4=320, and 5×4=20, and 14×4=56, and 7×4=28, and the individual shares of the present class be multiplied by the number of shares to which the deceased was entitled at the former distribution. Thus: 2×5=10, and 1×5=5. At the third division, on the death

CASE LXXXVI.

Q. 1. A person dies, leaving as his heirs, a widow, a son and two daughters. Subsequently one of the daughters died, leaving no children, and next the widow of the proprietor died. The son of the proprietor then died, leaving a widow and a son, lastly his grand-son died. Under these circumstances, how, according to the Moohummudan Law, will the survivors (the daughter and the widow of the son of the original proprietor) share his property; no distribution having taken place during the life-time of the deceased persons above-enumerated?

Of a widow, two daughters and a son; one of the daughters, the widow, the son (leaving a widow and a son), and lastly the grand-son successively dying.

R. 1. There are only surviving a daughter of the original proprietor and a widow of his son; the property will in this case be made into three shares, of which the widow of the son will take two and the daughter the remaining one: because, when the original proprietor died, he left a widow, a son and two daughters as his heirs. The widow's share was one-eighth of his property and the remainder belonged to his son and daughters, in the proportion of two shares for the male and one for the female; in other words, the son had a right to one-half and the daughters to the other half or a quarter each. On the death of one of the daughters, who left no issue, her share was to be made into three parts, of which two appertained to her brother, and the remaining one to her sister; and, after the death of the widow of the original proprietor, her

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of the daughter, to conform to the rules that a husband shall have a moiety where there are no children, and that a male shall have double the portion of a female, her property must be made into six shares at least, but, being a case of vested inheritance, the same process must be observed as in the last case. The result of the comparison of the numbers will be the same, for 33 and 6 are prime. Thus: $6 \times 5 = 33 - 3$ and $3 = 5 - 2$ and $2 = 3 - 1$. On multiplication according to the preceding rule the sum will be found to be 1920. Thus the preceding result $320 \times 6 = 1920$.

legal share was to have been made into three parts, of which her son would take two and the surviving daughter one; and of the share of the son of the original proprietor, which he should have inherited from his sister and mother, one-eighth will at his death go to his widow and the remainder to his son. On the death of his son, who was grand-son of the original proprietor, his whole property will be vested in his mother, because she is entitled to one-third as her legal share, and to the remaining two as the return. Under this distribution, two-thirds of the property of the original proprietor will devolve on the widow of his son and the remaining one on his daughter.* It is laid down in the *Sirajyya*,—

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* In this case of Vested Inheritance, the result must be arrived at by the following calculation:—

At the First Distribution the property should have been made into thirty-two parts, (the heirs being a widow, a son and two daughters, and the number eight not being divisible among the claimants without a fraction) agreeably to the Third Principle of Distribution (77); of which parts the widow should have got 4, the son 14, and the daughters 7 each.

At the Second Distribution, on the death of one of the daughters, the heirs being her mother, brother and sister, her property should have been made, agreeably to the Third Principle of Distribution, into eighteen parts, (the number six, into which it was necessary to make the estate, to give the mother her sixth, not being divisible among the claimants without a fraction) of which the mother was entitled to three, the brother to ten, and the sister to five; but this being a case of Vested Inheritance, it becomes necessary to compare the number of shares which the daughter had at her death with the number of shares into which her estate should be made. Thus: $7 \times 2 = 18 - 4$, and $4 = 7 - 3$, and $3 = 4 - 1$, which giving a *Mootubayun* or prime result, the rule is (see Prin: Vest: Inh: 98,) that the aggregate and individual shares of the First Distribution must be multiplied by the aggregate of the shares of the Second Distribution. Thus: $32 \times 18 = 576$, and $4 \times 18 = 72$, and $14 \times 18 = 252$, and $7 \times 18 = 126$, and the individual shares of the second class must be multiplied by the amount to which the daughter was entitled at the preceding distribution. Thus: $3 \times 7 = 21$, and $10 \times 7 = 70$, and $5 \times 7 = 35$.

At the Third Distribution, on the death of the mother, her property should have been made, agreeably to the First Principle of Distribution, into three parts, of which her son was entitled to two and her surviving daughter to one—but, being a case of Vested Inheritance, it becomes necessary to compare the number of shares which the mother had at her death with the number of shares into which her estate should be made. Her shares, according to the preceding results, amounted to 93—on the First Distribution 72, and on the Second 21, and the estate now should be made into three. Thus: $3 \times 31 = 93$, which gives a *Mootudakhil* or concordant result, showing that the numbers agree in 3, in which case the rule is (see Prin: Vest: Inh: 99,) that the aggregate and individual shares of the first distribution be multiplied by a third of the aggregate

Authority for the widow's succession.

"Wives take in two cases: a fourth goes to one or more on failure of children, and son's children, how low soever; and an eighth with children or son's children, in any degree of descent." So also on the subject of the daughter's claim to inheritance,—"Daughters begotten by the deceased take in three cases; half goes to one only, and two-thirds to two or more; and, if there be a son, the male has the share of two females, and he makes them residuaries." So also the same authority treating of a sister's right of inheritance,—"If there be brothers by the same father and mother, the male has the portion of two females; and the females become residuaries through him by reason of their equality in the degree of relation to the deceased;" and

For the daughter's.

For the sister's.

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of the shares of the Third Distribution; but the third of the aggregate in this case being only one, multiplication is of course needless, and the ninety-three shares which were the property of the mother at her death, must be divided between her son and daughter, the former getting a double share or 62, and the latter 31. This last result is obtained by muliplying the share of the son and daughter (2 and 1) by 31 or a third of the number (93) to which the widow was entitled.

At the Fourth Distribution, on the death of the son, his property should have been made agreeably to the First Principle of Distribution, into eight parts, of which his widow was entitled to 1, and his son to 7, but being a case of Vested Inheritance, it becomes necessary to compare the number of shares which the son had at his death with the number of shares into which his estate should be made. His shares, according to the preceding results, amounted to 384 (at the First Distribution 252, at the Second 70, and at the Third 62,) and the estate now should be made into eight. Thus: 8 × 48=384, which gives a *Mootudakhil* or concordant result, showing that the numbers agree in 8; in which case the rule is (see Prin: Vest: Inh: 99,) that the aggregate and individual shares of the preceding distribution be multiplied by an eighth of the aggregate of the shares of the Fourth Distribution; but the eighth of the aggregate in this case being only one, multiplication is of course needless, and the 384 shares which were the property of the son, at his death must be divided between his widow and his son, the former getting one-eighth or 48 shares, and the remaining 336 shares devolving on his son. This last result is obtained by multiplying the share of the son and widow (7 and 1) by 48 or an eighth of the number (384), to which the son of the original proprietor was entitled.

At the Fifth Distribution, on the death of the grand-son, his 336 shares should have gone to his mother. The widow of the son would thus have had 384; but the surviving daughter of the original proprietor inherited from her father, sister and mother 192 shares.

At the final Distribution therefore the property should be made into 576 parts, of which two-thirds or 384 should belong to the widow of the son, and one-third or 192 to the daughter of the original proprietor.

on the subject of a mother's claim of inheritance it is stated,—" The mother takes in three cases; a sixth with a child, or a son's child, even in the lowest degree, or with two brothers and sisters or more, by whichever side they are related; and a third of the whole on failure of those just mentioned;" and it is laid down in the same book of Law on the subject of the return,—" The return is the converse of the increase; and it takes place in what remains above the shares of those entitled to them, when there is no legal claimant of it: this surplus is then returned to the sharers according to their rights."

For the mother's.

For the return.

CASE LXXXVII.

Q. A person dies, leaving a widow, a brother, a sister, his widow's mother and his widow's brother. The widow dies before the distribution. In this case, which of the survivors are entitled to inherit the estate of the deceased, and in what proportions?

R. In this case, all the persons enumerated in the above question will be entitled to share the inheritance. The estate should be made into twelve shares, of which the brother of the deceased will be entitled to six, his sister to three, his widow's mother to one and his widow's brother to two.*

Of a brother and sister with widow's mother and brother, the widow having died before the distribution.

* The property in the first place must be made into four shares, the claimants being, on the death of the proprietor, his widow and his brother and sister. This is the least number out of which the widow could get her share (one-fourth). She receives one; the brother two, and the sister one. On the death of the widow her property will be made into three shares, the least number out of which the widow's mother could get her share (one-third). But according to the rule in cases of vested inheritance, her share (1) will be compared with the number of the division (3), and being found to be prime or divisible by an unit only (see Prin: Vest: Inh: 98), the aggregate and individual shares of the first class will be multiplied by the aggregate of the shares of the second—thus: $4\times3=12$, and $1\times3=3$, and $2\times3=6$. After which the shares of the present class should be multiplied by the number to which the widow was entitled at the former distribution; but that number being only one,

CASE LXXXVIII.

Q. The proprietor of a certain estate dies, leaving two sons and four daughters by two different wives, one of whom survives him. After his death one of his sons, begotten on his first wife, dies, leaving three sons. The surviving son of the original proprietor, with his four sisters, who are by the same mother and father, and the three sons of his late half-brother, and his own mother, being nine in number, are the surviving claimants to the estate. Under these circumstances, according to Law, in what portions will his property be inherited by the nine individuals aforesaid?

Of a son, four daughters, a widow and three sons of another son, who died before the distribution.

R. In this case the property of the deceased ancestor will be made into one hundred and ninety-two shares, agreeably to the Law of vested inheritance, of which twenty-four shares will go to his surviving widow, forty-two to his son who is still living, twenty-one to each of his four daughters and fourteen to each of his three grand-sons, being the sons of his son who died subsequently to his death and previously to the distribution.*

CASE LXXXIX.

Q. The proprietor of half a dwelling-house and other property, inherited from his ancestor, dies, leaving

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the multiplication is needless. Thus of the whole number 12, the brother of the original proprietor will get 6, his sister 3, his widow's mother 1 and his widow's brother 2.

* In this case of vested inheritance the property should agreeably to the Third Principle of Distribution (77) have been made into 64 parts to satisfy all the claimants who were entitled to share on the death of the ancestor; as in the first instance it should have been made into eight parts (the widow's share being an eighth), and as when the widow received her share, there remained only seven to be divided among the remaining eight claimants (one male counting as two females). Then on the death of one of the sons, his sixteen shares being compared with the number of his heirs or three, and proving prime, the number of the original division should be multiplied by the whole number of the second set of heirs. Thus: $64 \times 3 = 192$. See Prin: Vest: Inh: 98.

three sons and a daughter. Before any division of the patrimonial property has taken place one of the sons dies, leaving a widow besides his two brothers and his sister. Under these circumstances to what proportions of the property will the survivors be entitled to succeed respectively?

Of two sons, a daughter, and the widow of another son who died before the distribution.

R. According to the Principles of Vested Inheritances the whole of the property left by the ancestor must be made into seventy portions, out of which each of the sons will be entitled to twenty-six, the daughter to thirteen and the deceased son's widow to five shares.*

CASE XC.

Q. A person dies, leaving an only daughter, A, who subsequently dies, leaving a son, B, and husband, C, her surviving. The husband then dies, leaving as his heirs a widow, D, the son B, above-mentioned, begot-

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* To arrive at this result it must first be ascertained to what proportions the three sons and the daughter would have been entitled, had the inheritance been distributed on the death of the ancestor; and as a male is entitled to double the share of a female, it follows that the property, to be distributed without leaving a fraction, must be made into seven parts, of which the deceased brother's portion would have been two shares. When he dies, his share is to be distributed among his two brothers, his sister and his widow. But the widow's share, legally, where there are no children, is one-fourth, and therefore the smallest number of portions into which the deceased's two shares can be made is four. Now after the widow's share has been taken away there will only remain three to be divided among five (the sharers are called five, though in reality only three, one male counting as two females,) and the distribution obviously cannot take place without a fraction; in which case the rule is to search for the proportion between the sharers and the shares which is found to be *Mootubayun* or prime, or divisible by an unit only, which gives the Third Principle of Distribution (77). Thus: 4=5—1. The rule in the Third Principle is that the number of sharers be multiplied into the root of the case. Thus: $4\times5=20$. which result, were it not a case of vested inheritance, would furnish the number from which the several shares were to be extracted, but this being the case, the proportion between that result and the number of the deceased's former shares must be ascertained, which will be found to be concordant. Thus: $2\times10=20$, in which case the rule (see Prin: Vest: Inh: 99) is that the aggregate and individual shares of the preceding distribution be multiplied by the measure of the number of shares into which it is necessary to make the estate at the second distribution. Thus: $7\times10=70$, &c.

ten on his former wife, another son, E, by the wife who survived him, and four daughters, F, G, H, I, also by the surviving wife—the estate not having been distributed during his life-time. In this case how will the property left by the deceased ancestor be shared among these individuals?

Of a husband and son, the husband dying before the distribution and leaving a widow, another son and four daughters.

R. Under the circumstances stated, the property will be made into two hundred and fifty-six parts, of which two hundred and six shares will go to the son of the first wife, fourteen to the son of the wife who survived her husband, eight to the widow and the remaining twenty-eight to the four daughters or seven shares to each.*

CASE XCI.

Q. A person (A) dies, leaving a widow B, three sisters C, D and E, and F, the son of his paternal

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* In this case of vested inheritance the subjoined table may tend to illustrate the order of succession:—

PROPOSITUS.

A $4 \times 64 = 256$.

C $1 \times 64 = 64$. B $3 \times 64 = 192$.

C $1 \times 64 = 64$.

I	H	G	F	E	D	B
7	7	7	7	14	8	14==64.

At the distribution which should have taken place on the death of A, the property must have been made into at least four parts, to give her husband one-fourth. Then, at the distribution which should have taken place on his death, the property belonging to him should have been made into at least eight parts, to give his wife one-eighth; but when she has taken her eighth, as the remaining heirs cannot get their portions without a fraction, and as on a comparison of the number of them with that of the shares reserved for them, it gives a prime result, the number of the original division, see Third Prin: of Dist: (77), must be multiplied by the number of such heirs which is eight, one male counting for two females. Thus: $8 \times 8 = 64$. Then, according to the Law of vested inheritances, the number to which the deceased was entitled at the First Distribution being compared with the number into which it is necessary to make the second, and being found to be prime, the rule is (see Prin: Vest: Inh: 98), that the aggregate and individual numbers of the first division be multiplied by the whole of the second, according to which process, the son by the first wife will get 206 shares; 192 at the first and 14 at the second distributon.

uncle. Subsequently to his death one of his sisters, D, dies, leaving a daughter G, during the life-time of the persons above named. Afterwards E dies, leaving a daughter H. Under these circumstances, according to law, how will the property of the original proprietor be distributed among the survivors?

Of a widow, three sisters and a paternal uncle's son; two of the sisters dying prior to the distribution, each leaving a daughter.

R. Under the circumstances above stated, after the performance of his (A's) funeral ceremony and burial without superfluity of expence, yet without deficiency, the satisfaction of his just debts, and the payment of his legacies out of a third of what remains after his debts are paid, the residue of the property left by A, according to the Law of Vested Inheritance, will be made into thirty-six parts, of which nine shares will go to B, fifteen shares to C, three to F, four to G and the remaining five to H.*

* In the first instance the property should have been made into twelve parts, the portion of the widow being one-fourth and of the sisters two-thirds; and in this case the rule being that the division be made by twelve (See Prin: Inh: 14, 24 and 65.) But eight, which is two-thirds of twelve, cannot be distributed among the three sisters without a fraction, and three is prime to eight Consequently in conformity to the Third Principle of Distribution (77) the number of the original division should be multiplied by the number of sharers who cannot get their portions without a fraction. Thus: $12 \times 3 = 36$, which must be distributed in the following manner:—

B	C	D	E	F
9	8	8	8	3

On the death of D, the number to which she was entitled at the former distribution (8) and the number into which it is necessary to make her estate (4), being *Mootudakhil* or concordant, no further process is necessary, and her eight shares will be distributed thus:—

C	E	G
2	2	4

So also on the death of E, by the same rule, of her ten shares, her daughter H will get one moiety and her sister C the other.

CHAPTER II.

PRECEDENTS OF SALE.

CASE I.

Q. Certain lands are the joint property of several individuals. One of the joint proprietors, without the consent of the rest, executes a deed in favor of a stranger, transferring to him a part of his right and interest in the said joint property, without making any specification of the boundaries; the deed merely reciting that the lands so transferred are his sole property. In this case is the deed valid?

Difference between the legal provisions of sale and gift.

R. If the deed, purporting to transfer to another the acknowledger's right to a part of his interest in a joint undivided estate, be a deed of gift, it will not be valid according to Law, without a specification of the boundaries, because an undefined gift is illegal: but, if it be a deed of sale, it will be valid; for, to this species of contract, partnership, indefiniteness and want of consent on the part of the joint proprietors, and non-specification of the boundaries, are no objections. The sale, therefore, must unquestionably be maintained as valid and binding.

CASE II.

Q. A person having rented a small piece of ground, and having built a house, and planted trees thereon, dies, leaving two sons, a wife, and a mother. On his death, and during the life-time of the mother (the property being undivided), his wife and his sons sell every thing on the premises. Is the sale good, under these circumstances? or is the mother entitled to inherit any portion of her son's property? and if so, to what pro-

portions are the above mentioned persons severally entitled, of the deceased's property?

R. If some of the heirs sell the undivided property specified in the question, the contract will be binding as far as regards their own shares. But any coheir, who was not a party to the sale, is entitled to recover his portion of the inheritance, his right not being defeated by their act.*

A sale of undivided property is good against the seller, but not against a stranger to the contract.

CASE III.

Q. A person, during his life-time, having made his landed property into three equal parts, sold one part to each of his wives in satisfaction of their respective dowers. Part of the property so sold was parcelled off, and part continued undefined. Afterwards the son of the seller's second wife, having succeeded by inheritance to the share sold to his mother, sold such share to his own wife in satisfaction of her dower. The lands so sold, however, remained ostensibly in his possession and under his management. Is such sale valid according to Law, notwithstanding the want of proof as to the purchaser's seizin and possession?

R. The validity of a contract of sale is not dependant on the immediate seizin of the purchaser, nor is it at all affected by the property sold being undivided. The sale therefore, by the original proprietor, of his landed property in three equal portions to his three wives is valid, although some part of the portions was not defined. The son of the seller's second wife suc-

Neither immediate seizin nor division essential in sale.

* There is a distinction between the case of a sale, and of a gift in the Moohummudan Law. Had the property in the case in question been disposed of by gift, instead of by sale, the transaction could not have been upheld as valid, because, in the former case, seizin is necessary, which cannot take place, where the particular share or shares to be disposed of, are not distinctly separated and defined.

ceeded to his mother's share by inheritance, and the sale by him of such share to his own wife, in satisfaction of her dower, is also valid, although he remained seized and possessed of the same subsequent to the sale. The purchaser is at liberty to make seizin thereof, at any time she may think proper.*

CASE IV.

Q. Zeyd sells his dwelling house, and the lands thereunto annexed, to Omar, stipulating for the sum of two thousand rupees as the price of the property sold, to which Omar agrees, and pays to Zeyd twenty-five rupees, as earnest money, promising to pay the remainder of the purchase money on a certain date, when the deed of sale was formally to be drawn out. Zeyd, being satisfied with these conditions, relinquishes the property to Omar, who takes possession accordingly, and places his own people on the premises. Under these circumstances is the sale complete? is either of the parties at liberty to retract? or is Omar compellable to pay the whole of the purchase money?

Circumstances under which a sale is complete and binding.

R. Under the circumstances stated the sale is complete; neither party is at liberty to retract; and the money is due from the purchaser. According to the *Hidaya*,—Sale is completed by tender and acceptance when both terms are expressed in the past tense, as if one party should say, "I have sold;" and the other should say "I have bought." It is to be observed that, in like manner, a sale is established by any other words expressive of the same meaning; as if either of the parties for instance should say, "I am contented with the price," or "I have given you this article for a

* The doctrine maintained in this is corroborated by what was laid down in the two preceding cases.

certain price," or "take this article for a certain price." When the declaration and acceptance are absolutely expressed without any stipulation, the sale becomes binding, and neither party has the power of retracting.* A sale is valid either for ready money or for a future payment, provided the period be fixed.† So also in the *Kunzooduqaiq*,—"A sale is a barter of one property for another by the mutual consent of the parties; it is completed by declaration and acceptance, and is valid either for ready money or for a future payment."

Definition of sale.

CASE V.

Q. A person, by means of an agent, makes a sale, to his own son, of his real property, and executes a deed of sale thereof, in due form, properly sealed and attested. He, afterwards, by means of a deed of gift, makes a present to his son of the purchase money. He himself (the father) retains possession of the property on account of the minority of his son, and keeps by him both the deed of sale and the deed of gift. After the deed of sale (which did not specify any condition) had been completely executed, but before it was delivered to the purchaser, the seller became desirous of annulling it, alleging that he had executed it on the faith of a condition which had been infringed; and on claim being made in a Court of Justice, he declared the deed to have been executed subject to the condition alluded to, in corroboration of which assertion he urged the fact of his having continued in possession of the property sold and of his not having delivered up the

* The purchaser may however retract in case of a defect or of the property purchased not having been inspected. See Prin: of Sale 21 and 26, and the *Hidaya*, vol. 2d, page 363. It may be observed that according to the doctrine of *Shafei*, the parties have an option of retracting until the breaking up of the assembly in which the contract was formed. But this opinion has been overruled.—*Ibid.*

† See Prin: of Sale 12 and 18.

deed of sale, stating that the condition upon which it was executed, had been violated by the mother of the purchaser, and that, therefore, the sale in question was invalid. Under these circumstances, is such sale legal and valid or otherwise?

Of sale by a father to his minor son.

R. If the father of the minor appointed a person to make the sale on his part, and that agent, in the presence of the father, declared that he had, in pursuance of his agency, sold certain property to the son, and the father expressed his consent to the declaration, the sale will be valid. If such was not the case, or if the sale was accompanied by a condition at variance with the nature of such contract, it will be null and void. According to the *Foosool-i-Imadeeya* and the *Foosool-i-Oostoorooshee,*—"When a person commissions another to act as agent for him, in selling his property to his minor son, or as agent to purchase it for his minor son, the contract is not valid, unless the father be present and consent." So also in the *Hidaya,*—"The insertion of any condition, which is not a necessary result of the contract, and in which there is an advantage either to the buyer or to the seller, or to the subject of the sale (if capable of enjoying an advantage), renders the contract invalid."* It remains for the

A sale with extraneous conditions is void.

Authorities.

* See Prin: of Sale 16. The principle on which this rule is founded is the prevention of usurious contracts and the occurrence of strife, after the completion of the bargain. One example given in the *Hidaya* is the sale of a slave, with a stipulation on the part of the seller, that the purchaser shall emancipate him. Here the condition invalidates the contract, because the purchaser is subjected to loss without an equivalent. The advantage, in this instance, is intended for the slave who is the subject of the sale. But it is otherwise where the condition, altho' not a necessary result of the contract, is not intended to confer advantage on either party, or on any particular individual, as where a person sells an animal to another, on condition that the purchaser shall sell it again. In this instance strife could not ensue, because no particular individual could prefer a claim against the purchaser. Vide *Hidaya,* vol. 2, page 446. Consequently in the case cited, if it appeared in evidence that the father, when he made the sale to his son, annexed to the contract a condition, calculated solely for his own advantage, the sale must have been held to be null and void.

Court to investigate and decide, whether the sale referred to, was made in the manner first stated, which would establish its validity, or in the manner subsequently stated, which would render it null and void. But the wording of the deed is the same as that which is generally used in similar transactions of purchase and sale, and it does not appear from it that there existed any condition repugnant to the particular contract in question.

CASE VI.

Q. A woman having a minor son, who has no other guardian or protector but herself, sells a small portion of his landed property to realize funds for the purpose of instituting a suit to recover their joint estate, (in which she ultimately obtained judgment in her favour) and executes a deed of sale with the joint signature of herself and son. Under these circumstances is the deed so signed, and the sale founded thereon, valid or otherwise?

Sale by a mother of her minor son's property.

R. The guardianship of a mother* does not extend to the exercise of any right over the property of her minor son. Therefore a sale by her of any portion of her minor son's immoveable property is totally illegal and inadmissible.†

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* The same question having been propounded, on the ninth of the same month and year, to another Mooftee who was officiating for the established Law Officer, he replied that a mother was not competent to make a sale of her minor son's lands, even under the probable expectation of benefit accruing therefrom; but that, as the minor had signed the deed of sale, his consent was proved, and that, if he possessed sufficient discretion to understand a negotiation of purchase and sale, such sale would be valid, on condition of it's being approved by his father, or the executor of his father, or his paternal grand-father, or the ruling authority. This opinion, however, was not applicable to the case in question, the minor not having any such guardian at the time of the sale.

† The mother's guardianship extends only to the right of custody during infancy, and to disposal in marriage; but this last only in case of there being no paternal relations. The right over the property of wards

CASE VII.

Q. A person sells his portion of a maternal estate, specifying the number of shares, and acknowledges the sale, admitting that he had received the full value of the property sold. The purchaser also makes a declaration as to the validity of the transaction, and they both jointly prefer a claim against the coheirs of the seller to obtain possession of the property sold, with a view to the fulfilment of the contract. The defendants, in the suit which was preferred for this purpose, acknowledge the right of the seller. Under these circumstances is the sale legal and valid, and is the purchaser entitled to possession under it, or is the circumstance of the property not having been divided among the coheirs, sufficient to invalidate the contract. Supposing that the seller having admitted in his written claim above alluded to, that he had made the sale and received the purchase money, should, by entering into a combination with the defendants (one of whom is his grand-mother and the others his maternal aunts), withdraw his claim, will such retractation annul the right of the other claimant, that is to say, the purchaser?

Sale of an undivided share of landed property, with subsequent retractation.

R. The sale in question is in every respect valid and binding according to Law. The non-division of the property is not a disqualifying circumstance; according to the *Shurh-i-viqaya*,—"The sale of ten out of a hundred shares is allowable." So also according to the *Hidaya*,—"If a person purchase ten shares (of a house or bath) containing one hundred shares, it is valid in the opinion of all our Doctors." The retractation of the

is vested in the following guardians only, in the order enumerated:—The father, the guardian appointed by the father, the paternal grand-father, the guardian appointed by the paternal grand-father, and lastly the ruling power. See Prin: Guar: and Min: 5 and 8.

claim by the seller, after having acknowledged the sale, and the receipt of the full value, cannot in any manner invalidate the right of the purchaser; according to the *Hidaya*,—"When a person possessing sanity of mind and arrived at the age of maturity, makes an acknowledgment of a right, such acknowledgment is binding upon him." Under these circumstances, therefore, the purchaser is entitled to possession of the share sold.

CASE VIII.

Q. A person sells his dwelling house to another, and receives the price from the purchaser. He also executes and makes over to the purchaser a deed of sale for the same, attested by four witnesses. But the seller did not sign the instrument; the seal of the Cauzee was not affixed, nor was it registered, nor was the date of the month or year inserted. The seller now raises objections to the transaction, and, six months after the execution of the deed, sues the purchaser for rent. Under these circumstances, in virtue of the deed aforesaid, is the transaction valid or not?

Informality in the deed does not vitiate a sale, otherwise complete.

R. The sale is completed by tender and acceptance having passed between the seller and the purchaser. Besides the purchaser paid the price to the seller, and the seller received it, without hesitation. Under these circumstances the objection of the seller can have no weight in law. The seller has nothing to do with a third person claiming the right of pre-emption, who may sue the purchaser.* The deed of sale bearing no date, seal or registry, is undoubtedly informal, but that

* In this case the seller pleaded that the sale was void, from the circumstance of his having no power to sell to the purchaser and thereby deprive a third person of his right of pre-emption; but it was held that this plea was unavailing, as between the seller and purchaser.

circumstance does not vitiate the sale itself.* The seller's claim for rent due previously to the sale will hold good.

CASE IX.

Q. A Moosulmaun executes two successive deeds of sale in favour of his wife, and continues in possession of all his property for the space of nine years, subsequent to the execution of such deeds, during which time he did not make out a formal deed of sale with the *Kazee's* attestation, as was promised in the former deeds. Under these circumstances, does the property, of which mention was made in the deeds of sale, belong to his widow, or is it to be taken as the estate of the deceased, and divisible as such among his other heirs?

Uncertainty as to the subject of sale vitiates the contract.

R. It appears from the deeds of sale that the husband sold to his wife, in exchange for the sum of fifteen thousand rupees, of her claim of dower, all the lands and houses specified in the deeds, his household property, every thing that he acquired by inheritance, together with all the property that he might be possessed of up to the day of sale. Now the conditions of this contract are invalid, and it is null and void, because the property sold is not specified, and uncertainty legally vitiates a contract of sale.† The heirs of the seller are therefore at liberty to set aside the contract. The sale would not be necessarily invalid by reason of the deed not having been officially attested by the *Kazee*,‡ nor by the fact of the seller having continued in possession for the period of nine years subsequent to the execution of the deed.§ On the annulment of the sale,

* See Prin: Claims, &c. 3.

† Prin: Sale 13. ‡ Prin: Claims 3. § Prin: Sale 12.

his property, after the satisfaction of his debts, will be distributed among his heirs.

CASE X.

Q. A Moosulmaun disposes of all his property to his wife by a *Beea Mokasa.** In the deed of conveyance there is, among other property, a landed estate, which, before the execution of the deed of *Beea Mokasa,* had been farmed by the proprietor to a stranger, for the term of six years, the proprietor receiving an advance of rent amounting to four thousand five hundred and one rupees. Now under these circumstances and supposing the purchaser by the *Beea Mokasa* never to have got possession, under that deed, of the estate that was farmed out, is the deed valid or not?

In a *Beea Mokasa* immediate possession not necessary.

R. Under the circumstances stated, according to Law, the estates, whether one, two or more, that were specified in the deed of *Beea Mokasa,* will pass and be conveyed in virtue of the deed, notwithstanding that the person who executed that deed may have farmed them out for a term of six years, before the execution of the deed; and according to the above contract, the purchaser (that is to say the wife) will be proprietor of the estate. As, in a contract of *Beea Mokasa,* the Law does not require seizin and possession, the deed of *Beea Mokasa* will be legally vālid, although the purchaser may be out of possession for several years.†

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* *Beea Mokasa* or barter is defined to be the exchange of property for property. It is sale in one shape and purchase in another shape. Neither of these can be absolutely termed a *sale.* See Hamilton's Hidaya, vol. 3, page 31.

† It may be presumed, although not distinctly mentioned in the question or opinion, that this was a case of dower between the husband and wife, the former assigning to the latter an estate in lieu of the dower he had stipulated to pay her. The transaction in this case resembled a *Hiba-bil-Iwuz,* or gift for a consideration. See note to case 18, page 96.

CASE XI.

Q. If a man during his life-time make a *Bye-bil-wuffa*, or conditional sale to another of his property, for a term of ten years, is the widow of the mortgager, after his death, before the expiration of the term fixed, and without having fulfilled the conditions of the contract, at liberty to make an absolute sale of such property to a third person?

Of an absolute, with a conditional sale.

R. Such sale is legally valid, but its operation is suspended on the pleasure of the conditional purchaser. He may give it effect if he pleases, but he cannot annul it. It depends also on the pleasure of the absolute purchaser. If he pleases he may wait until the expiration of the term, or he may immediately return, to the conditional purchaser, the money borrowed from him, having recourse, if necessary, to a judicial decision to set aside the conditional sale; because the effects of a conditional sale and a pledge are legally the same: and if a pawner sell a pledge, without the permission of the pawnee, the sale is valid, but the effect of the sale is suspended on the pleasure of the pawnee. The purchaser also is at liberty to wait until the redemption of the pledge, or to cause its redemption by an appeal to a judicial tribunal. Authority from the *Viqaya*,—"A sale by a pawner of his pledge should be suspended on the pleasure of the pawnee, and the sale takes effect if the pawnee agree, or if the debt be discharged; in the former of which cases the price is to be deposited in lieu of the pledge sold. According to the correct opinion, the pawnee has no power of cancelling the sale, but the purchaser is at liberty either to wait until the article be redeemed or to cause its redemption by appeal to a judicial tribunal." Also in the *Kholasa* cited from the *Futwas* of *Nujmoodeen Nusfee*. "The rules that apply to a pledge apply equally to a *Bye-bil-wuffa* or conditional sale."

The law of pledges applies to conditional sales.

CASE XII.

Q. A husband, in his last illness, five days before his death, disposed of his property by sale to one of his wives. Is the sale under such circumstances available in Law?

R. The validity of a death-bed sale to one heir depends on the consent of the deceased person's other heirs. If they express their sanction to the sale the contract is legal and binding; otherwise it is null and void, as is laid down in the *Khizanutool Mooftieen*,—" A person being on his death-bed sells a certain part of his estate to one of his heirs; he lives about five days afterwards, and then dies. Subsequently to his death, if his remaining heirs do not give their consent to the sale, it is rendered null and void."*

Of a death-bed sale to an heir.

CASE XIII.

Q. A man being involved in debt, made over by gift to his wife, without satisfying his creditors, all his property, real and personal, without specification, in exchange for her dower, which she remitted in consideration of the gift. The property so given continued in the joint use and occupancy of the donor and donee, who had apparently the same interests therein. The husband is still alive; under these circumstances is the debt of dower due to the wife entitled to satisfaction in preference to the claims of the other creditors, who are strangers?

R. According to Law, the dower of the wife is a debt, and stands on an equal footing with the just claims of other creditors; either description of debt being entitled

Specification of the subject is requisite in all contracts of exchange.

* The reason of this is, that in a death-bed sickness, a man is not supposed to possess the exclusive right over his property, as the claims of the heirs then begin to assume an inchoate existence.

to prior satisfaction: and a debtor is at liberty to satisfy one claim in preference to another, or to assign any part of his property in liquidation of the debt of any particular creditor. On this principle it would be lawful for the husband to discharge the debt due on account of his wife's dower, before satisfying the claims of the other creditors who are strangers; and it would also be allowable in him to make a gift of his immoveable property in exchange of the dower, which transaction would be nominally a gift, though virtually a sale. But in this case the amount of the dower due does not appear to have been specified, nor the site and boundaries of the immoveable property. The Law however requires specification in all contracts of exchange; and this being indispensable,* the deed of mutual gift, which is in this case destitute of it, is not valid and binding. Independently of this objection, taking the transaction in the light of a gift, there does not appear to have been, on the part of the donee, such seizin as the Law requires.

CASE XIV.

Q. 1. If a person sell his own property, together with the property of another, by one contract, without defining how much of the price received is opposed to his own, and how much to the other person's property, is such contract, which is unauthorized as far as regards the property of the other person, to be held valid and binding or otherwise?

Rules in case of sale of property not be-

R. 1. The sale of a person's own property, mixed up with that of another, without defining the respective

* This is indispensable because (See Prin: Sale 13) it is requisite that, in all contracts of this nature, such certainty should exist as to preclude the possibility of all future contention as to the meaning of the contracting parties.

prices attached to each, admits of two predicaments. In one case the seller may have disposed of the property of another person together with his own, representing it as entirely belonging to himself. In this case, when the lawful proprietor appears, the purchaser will be entitled to receive back from the seller so much of the price as may be equivalent to that part of the property sold which may be proved to belong to the claimant, and the contract will hold good as far as regards the remainder of the property sold; because an established claim to part does not affect the validity of the whole transaction. The entire purchase is opposed to the entire sale, and the component parts of the price paid to the component parts of the property sold. In the other case, he may have disposed of another person's property together with his own, such property avowedly belonging to another individual, without his consent (though for his benefit,) and without making any distinction as to the price, in which case the sale is unauthorized, and the rule is that its validity is suspended on the consent of the proprietor, who is at liberty either to confirm the sale or to annul it, as far as regards his own property; but to the extent of the seller's share, the contract will be valid and binding against him.

longing to the vender.

Q. 2. A person being deeply involved in debt, sells the whole of his property to his wife in exchange for her debt of dower, thereby entirely excluding his creditors from all hope of ever realizing their demands against him. Under these circumstances, is such sale legal and valid.?

R. 2. If the individual in question was afflicted with a mortal disease at the time he made the sale of all his property to his wife in lieu of her debt of dower, the

Of sales by a debtor made in sickness.

sale is invalid; because a person, under such circumstances, is not entitled to make a partial liquidation of his debts, satisfying some creditors at the expence of others. But, if he was in health, and of sound disposing mind at the time of the sale, it will be valid, because, notwithstanding the fact of his being deeply involved in debt, he has, under such circumstances, full dominion over his own property.

And in health.

CASE XV.

Q. A woman dies, having transferred her landed property to a stranger by a deed of sale. Ten years after her death, her nephew comes forward and claims the property sold by her, in right of inheritance. It appears from the evidence of two of the witnesses who attested the deed of sale, that the woman, when she executed it, was *non compos mentis*. Under these circumstances, what is the Law?

Sale by a *non compos* person invalid.

R. Sales made by sick persons on their death-beds, and at a time when they are not in full possession of their mental faculties, are invalid according to law; but the heirs and creditors of the seller are not competent to resume the property sold, without returning the price that may have been paid. Until they do so, the property sold will remain as a pledge in the possession of the purchaser.

Proviso in favour of purchaser.

CHAPTER III.

PRECEDENTS OF PRE-EMPTION.

CASE I.

Q. Certain lands are sold, and the person, who claims the right of pre-emption to them, lives at a great distance from the spot, as does his agent. About seven or eight months after the sale, the agent, becoming acquainted with the occurrence, writes to the purchaser, forwarding to him the amount of the purchase money, and he also writes to the seller. By this means another month elapses, at the end of which period he brings his claim into a Court of Justice. Is the claim of pre-emption admissible under the circumstances stated?

Forms to be observed in claiming pre-emption.

R. In this case it appears that the claimant to the right of pre-emption was at a considerable distance, and that his agent was also far removed from the place at which the sale was negotiated; that seven or eight months after the transaction, the agent of the claimant, hearing of the sale of the lands to which the claim of pre-emption is now adduced, wrote letters to the seller and purchaser, and forwarded, to the latter, the amount of the purchase money paid by him, and that one month afterwards he adduced his claim in Court. Such claim is legally admissible, because the affirmation by witness and immediate claim are required to be made on knowledge of the sale, and in this case it appears that the agent made claim immediately on hearing of the transaction, seven or eight months after it occurred; asserting his claim in writing and transmitting the amount of the purchase money. If, in the course of doing so, another month elapsed, the right to pre-emption cannot thereby be annulled. He is therefore at liberty to

bring his claim into a Court of Justice. The legal forms to be observed in asserting the right of pre-emption are immediate claim followed by affirmation by witness, which consists in the party going upon the lands, the right of pre-emption to which he claims, or to the seller or purchaser (whichever of them has possession of the lands), and saying that he is a claimant of pre-emption, that he has already asserted his claim, and that he continues to do so; at the same time calling witnesses to the fact of his making the claim. He may also depute an agent, provided he is at a considerable distance and cannot afford personal attendance; and, if unable to depute an agent, he may communicate with the seller or purchaser by letter; and if unable to do either, his right of pre-emption still remains, and he may bring it forward whenever he has it in his power to attend for the purpose. If, on immediate claim and affirmation by witness being made, the purchaser or seller deliver up the lands to the claimant, there will be no occasion for applying to a Court of Justice; but if they decline doing so, they should be proceeded against within the period of one month. If the claimant neglect to sue for his right within that period, his claim is inadmissible, according to *Imam Moohummud.* The tenets of some modern authorities are in conformity with this opinion, and the commentator on the *Viqaya* has adopted it. But, according to *Aboo Haneefa,* there is no limitation of time for bringing the claim into a Court of Justice, and it is admissible if brought forward in any moderate period though exceeding one month. Such doctrine is conformable to the opinion held by the more ancient authorities, and the author of the *Hidaya* has followed it. In the case in question, however, the right is not affected even according to the doctrine of *Imam Moohummud,* because the month elapsed while the claimant was in progress of urging

his immediate claim. His claim, consequently, is legally admissible, though preferred after the expiration of one month. The following are the authorities for the above doctrine: *Shurhi Viqaya,*—"A person should assert his claim of pre-emption in the assembly (before it breaks up) where he hears of the sale, using language that is unambiguous, such as "I have claimed pre-emption, or the like, or I am a claimer of pre-emption, or I claim it." According to *Koorkhee,* the liberty to claim the right of pre-emption remains until the assembly breaks up; but according to other Doctors the right is lost, if silence be observed, even for a short time after the receipt of the intelligence of the sale. Such is the meaning of the term *tulb-i mowasibut* or immediate claim, which is so called, to shew the necessity of extreme despatch. He should next call persons to witness on the premises, or else in the presence of him (whether seller or purchaser) who has possession of them, and should say—"such an one has purchased this property and I have a right of pre-emption, to which I have laid claim and I still claim it. Bear witness therefore to the fact." This is the mode of affirmation by witness. It should be remembered, however, that this form must be gone through, in all possible cases, either on the premises or in the presence of the party in possession, insomuch that if the claimant has it in his power to do so, and neglect to act accordingly, his right to pre-emption is rendered null and void, according to the *Zukheera.* If a person, having a right to pre-emption, be on a pilgrimage to *Mecca,* and make the immediate claim, but be incapacitated from making the affirmation by witness, either on the premises or in the presence of the party in possession, he should depute an agent to do so if he can find one, and if not, he should send a messenger or a letter; but if unable to do this even, his right of pre-emption nevertheless

Of the immediate claim.

Of the affirmation by witness.

remains, and he may claim it whenever he attends; but if he wilfully neglect to conform to what is above required, his claim of pre-emption is rendered null and void: afterwards he should bring his claim into a Court of Justice and should declare to the following effect:—"Such a person has purchased such a property and I have a right to pre-emption in consequence of my property being situated in such a place—I therefore claim possession." This is called the claim of possession and litigation. The right of pre-emption is not affected by delay in preferring this claim, although according to *Moohummud* it is forfeited by the delay of one month, and this doctrine has been occasionally followed. But according to the *Hidaya*,—"If the person having the right of pre-emption delay making claim by litigation, still his right does not drop according to *Haneefa.* Such also is the generally received opinion, and decrees pass accordingly. There is likewise one opinion recorded from *Aboo Yoosuf* to the same effect. *Moohummud* maintains that if the person, having the right, postpone the litigation for one month after the taking of evidence, his right drops. This is also the opinion of *Ziffer*, and it is related as an opinion of *Aboo Yoosuf*, that his right becomes null if he delay the litigation after the *Kazee* has held one Court; for if he wilfully, and without alledging any excuse, omit to commence the litigation at the first Court held by the *Kazee*, it is a presumptive proof of his having declined it. The reasoning on which *Moohummud* founds his opinion in this particular, is that, if his right was never to be invalidated by his delaying the litigation, it would be very vexatious to the buyer; for he would be prevented from enjoying his property in the apprehension of being deprived of it by the claim of the person possessing the right of pre-emption. "I have therefore, says *Moohummud*, limited the delay that may

Of the claim by litigation.

be admitted, to one month, as being the longest allowed term of procrastination." In support of the opinion of *Haneefa* it is urged that, his right being firmly established by the taking of evidence, it cannot be defeated but by his own renunciation openly declared; in the same manner as holds in all other matters of right. With respect to what is mentioned by *Moohummud* that the delay would be vexatious to the buyer, it is of no weight; for, in case of the absence of the person having a claim to pre-emption, his right is not invalidated by the litigation being delayed; and the vexation sustained by the buyer from the delay is equally the same, whether the claimant be present or absent. If it appear that the *Kazee* was not in the city and that on that account the litigation was delayed, the right is not invalidated according to the concurrent opinion of the three above-mentioned sages; for the litigation can only be made in the presence of the *Kazee*, and the delay is therefore excused. A *Moosulmaun* and a *Zimmee*, being equally affected by the principles on which pre-emption is established, and equally concerned in its operations, are therefore on an equal footing in all cases regarding the privilege of it, and for the same reason a man, or a woman, a reprobate, a free-man, or a slave, (being either a *Mokatib* or a *Mazoon)* are all equal with respect to pre-emption."*

Who may be claimants.

CASE II.

Q. Shuhamut Ali was joint proprietor with the plaintiffs of an ancestrel estate. The share of each proprietor was defined, and they paid their rents to Government separately on their several portions. In the month of *Bhadoon*, Shuhamut Ali sold a part of his share of the estate to Munee Ram, a Hindoo, who was an entire

* See Prin: Shoofaa 4, 8.

stranger to the family. Towards the end of the month of *Assin,* the plaintiffs obtained intelligence of this transaction, and about the 15th of the month of *Kartick,* or nearly a month from the date of their obtaining the intelligence, they preferred their claim to the right of pre-emption; but they have failed to prove, that, at the proper period, that is, on their being apprized of the sale, they had recourse to affirmation by witness, and that they preferred an immediate claim to the seller and purchaser. Under these circumstances therefore, is their title to pre-emption good and valid, without proof of their having made the affirmation by witness, and immediate claim?

The right of pre-emption how defeated.

R. The right to pre-emption is not established according to Law, unless there be affirmation by witness, and immediate claim. According to the *Viqaya,*—" It is established by affirmation before witnesses," and the right to pre-emption is annulled by the omission to make immediate claim, and affirmation by witness. According to an extract from the *Mokhtar-ool Futawa,* contained in the *Madun,*—" It is annulled by the omission to make immediate claim." It is also stated in the *Shurhi Viqaya,*—" Know that it is requisite to make this claim, by calling to witness at the place where the property is situated, if possible, or in the presence of the possessor thereof; insomuch that, if this be possible, and the claim be not made accordingly, the right of pre-emption is annulled."

CASE III.

Q. Does the law fix any specific period within which it is necessary to prosecute a claim of pre-emption; and if so, what is the period? and if a person ten months after the execution of the deed of sale, duly sealed and attested, and after the purchase money has been paid

by the purchaser to the seller, prefer his claim to the property sold in virtue of his right of pre-emption, is such claim admissible; it being stated by the claimant that the property sold is in his possession as farmer; that after the sale, the purchaser sued the seller for the proprietary right, and that, for the purpose of procuring the registry of his (the purchaser's) name as owner, this suit was amicably adjusted between the parties, after which the circumstances of the sale were known to him; that, admitting his previous knowledge of the sale, this fact is a matter of no consequence, the deed of sale not being complete and binding until its authenticity had been legally proved, and that he had brought forward his claim within the period of one month from the date of the decision of the suit instituted by the purchaser. Under these circumstances, should the period be reckoned from the date of the deed of sale executed in favour of the purchaser, or from the date of the adjustment of the suit instituted by him?

Case of a claimant by pre-emption who, though aware of the sale, omits to come forward, until after formal adjudication of the purchaser's right.

R. The right to pre-emption cannot exist without proof of the *Tulub-i-mowasibut* or immediate claim. For this there is no specific period assigned, but all authorities agree in declaring the necessity of its being made by the person claiming the right to pre-emption on the instant of his becoming acquainted with the sale, without the least delay. This is absolutely requisite, so much so, that if any delay occur, the claim of pre-emption is void; for it is a claim which naturally rests upon a weak foundation. After the immediate claim and affirmation by witness, comes the claim by litigation, which signifies the preference of the claim to a Court of Justice. This is limited and confined according to one doctrine to the period of one month* from the date of

* It has been ruled, however, agreeably to the majority of legal opinions, that no length of time having elapsed previously to the claim of

the immediate claim, in the absence of any insurmountable obstacle. It appears in this case that the person claiming the right to pre-emption was aware of the sale previously to the amicable adjustment of the suit instituted by the purchaser, at which time it does not appear that he made the immediate claim, following it up by a claim of litigation. On the contrary, it appears that he declined doing so. His claim therefore is inadmissible. The statement of the claimant as to his having become acquainted with the circumstances of the sale, after the amicable adjustment of the suit is of no avail to his claim; this being in fact a second information which cannot legally be attended to, the first information being that contemplated by the Law. His pleas therefore as to this particular are inadmissible.

CASE IV.

Q. Certain lands were possessed jointly by a Hindoo and a Moosulmaun. The heirs of the latter sell a portion of such joint property to another Hindoo, who is a stranger to the parties. The Hindoo partner, at the time of the sale, objects to the transaction, and offers a price exceeding that paid by the purchaser, claiming, in due form, his right of pre-emption. Will his claim of pre-emption to the lands so sold hold good; or must the purchase of the stranger be upheld as valid?

A Hindoo has the right of pre-emption even against a Moosulmaun seller.

R. Under these circumstances, as the claimant is a partner, whose property is intermixed with that which has been sold, and as the purchaser is a stranger, the act of the heirs of the Moosulmaun must be considered illegal, and injurious towards the Hindoo partner, who objected and claimed his right of pre-emption in

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litigation, can render null the claim itself; because the right is absolute, and indefeasible after the immediate claim, and the claim by witness have been made. See Prin: Shoofaa 8, note.

due form. His claim of pre-emption therefore must be recognized, and the sale to the stranger must be set aside.*

CASE V.

Q. Three persons institute a suit against the seller and the purchaser of certain lands, claiming the right of *Shoofaa* or pre-emption. A decree was passed, reciting that the defendants should receive the sum of eighty sicca rupees, being the price of the lands in dispute, from the plaintiffs, and surrender the lands into their possession; but the plaintiffs did not pay the price, as ordered, nor did they take possession of the lands by obtaining the execution of the decree. One of the plaintiffs and one of the defendants having died in the interval, the surviving plaintiffs after the lapse of eleven years, eleven months and sixteen days, from the date of the decree, pray for permission to deposit the price of the lands in question, and to be put into possession thereof. Under these circumstances, are the plaintiffs entitled to enforce their right of pre-emption founded on the judgment originally pronounced in their favour?

Former judgment how rendered unavailable in a claim of pre-emption.

R. According to Law, the claim to the right of pre-emption holds good, and the order of the Judge decreeing the privilege thereof is available, even if the *Shafee* or person to whom the right of pre-emption appertains, should omit to produce the price of the lands in dispute at the time of the institution of the suit, but it is incumbent on him to produce the price when the Judge passes a decree in his favour. It is declared in the *Hidaya*,—"The *Shafee* may litigate his claim of *Shoofaa*

* See the remarks on claims of pre-emption by Hindoos in the Preface to this work.

although he do not produce in Court the price of the ground in dispute; but when the *Kazee* has decreed to him the previlege of *Shoofaa* it is necessary that he bring the price." According to the above doctrine, if the decree was passed for the immediate deposit of the value of the lands and for the delivery of them into the possession of the plaintiffs, the claim of pre-emption is defeated on account of the delay which occurred in making payment of the price. So also if the price be adjudged payable at a certain time, or the usual period (being one month) be allowed for the payment, and payment be not made before the expiration of such period, the right of pre-emption will be annulled, as is laid down in the *Futawa-i-Nukshbundee,*—" If a person purchase a house for a stipulated price in ready money, the *Kazee* will not pass a decree in favour of a claimant to the privilege of pre-emption, until such claimant produce the price or appoint a determinate period for its payment, to which, if he conform, his claim holds good; otherwise not." In this case, agreeably to both the above doctrines, the claim of pre-emption is legally null and void, on account of the delay which occurred in the payment of the price.

CASE VI.

Q. A person sells his landed property to his father or his brother. According to Law, does such sale to a relation exclude a stranger from claiming the right of pre-emption?

Claim of pre-emption against the seller's relative.

R. In a legal point of view the claim of a stranger, having the right of pre-emption, is not defeated by the circumstance of the purchaser being a relative of the seller, relation not being considered any ground whereon to found a claim to pre-emption.

CASE VII.

Q. A dispute arising between the person who has the right to pre-emption of certain lands, and the seller and the purchaser of those lands, the former contending that the price paid by the purchaser amounted to two hundred rupees only, and the two latter maintaining that the price paid was eight hundred rupees, the evidence on both sides being so equal as to form no ground for a determination, and it being urged by the former, that, in the event of a dispute in such matters, the Law declares, that the selling and purchasing parties should be put to their oaths, it is required to be stated, whether or not, according to the provisions of the Moohummudan Law, it is incumbent on the seller and purchaser above-mentioned to verify by oath their respective allegations?

Rules where the claimant by pre-emption and purchaser differ regarding the price.

R. According to Law, if the person who has the right to pre-emption, and the purchaser, differ in their allegations respecting the amount of the price paid, an oath is incumbent on the purchaser alone. If they both produce evidence, that of the person having the right to pre-emption, is preferable. These opinions are delivered in conformity to the doctrine laid down in the *Hidaya*. If the purchaser and *Shafee*, that is, the person having the right to pre-emption, differ regarding the price, the assertion of the purchaser must be credited, because here the *Shafee* claims the right to the property at a smaller price, which the purchaser denies; and according to Law, the declaration of a defendant on oath must be credited. They must not both be sworn, because the *Shafee* is plaintiff against the purchaser, but the purchaser is not plaintiff against the *Shafee*, he being at liberty either to claim or resign the property in question, and they cannot both be called upon to swear. If they

both produce evidence, that produced by the *Shafee* must be credited according to *Haneefa* and *Moohummud.**

CASE VIII.

Q. 1. A certain parcel of land has been sold, which is bounded, on the one side, by a Hindoo Temple, and, on the other, by the property of a private individual. The Superintendent of the Temple and the private individual both claim the right of pre-emption. Under these circumstances which of the two parties should be considered as possessing the superior claim?

Several claimants to pre-emption.

R. 1. Under the circumstances stated, neither party is entitled to preference, and their claims of pre-emption deserve equal consideration. After they shall both have contributed in equal proportions to pay the value of the property, they are each entitled to one half; according to the *Hidaya,*—" Where there is a plurality of persons entitled to the privilege of *Shoofaa,* the right of all is equal, and no regard is paid to the extent of their several properties." So also in the same authority,—" A Moosulmaun and a Zimmee being equally affected by the principles on which *Shoofaa* is established and equally concerned in its operations, are therefore on an equal footing in all cases regarding the privilege of *Shoofaa*; and for the same reason a man or a woman, an infant or an adult, a just man or a reprobate, a freeman or a slave (being either a Mokatib or Mazoon) are all equal with respect to *Shoofaa.*"

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* See Prin: Shoofaa 12. Aboo Yoosuf is of a contrary opinion, and maintains that the evidence of the purchaser is entitled to a preference in credit; but his arguments have been satisfactorily refuted in the Hidaya. Vide Hamilton's translation, page 578, vol. 3. And the exposition of the Law in this case seems conformable to the general doctrine of evidence that the oath of the defendant, and the evidence of the plaintiff are severally entitled to preference. See Prin: Claims and Judicial Matters, 25 and 29.

Q. 2. Supposing the property to which the right of pre-emption is claimed to be under litigation, will this circumstance invalidate the claim?

R. 2. A claim of pre-emption preferred by a person having the proprietary right of vicinage, is under all circumstances valid, and cannot be defeated by the fact of the property claimed being under litigation.

Case of claim to property under litigation.

CASE IX.

Q. 1. A person makes a *Bye-bil-wuffa* or conditional sale to another of his *Aymah* (rent-free) ground, with the trees which were planted thereon, for a term of ten years. The conditional purchaser is put into *bonâ fide* possession of the land, and, after some years, the conditional vender makes an absolute sale of it to a third person, to satisfy the debt due to the conditional purchaser. Under these circumstances is the right of *Shoofaa* or pre-emption, claimed by the proprietor of the village in which the *Aymah* land is situated, and who received *Malikanah* or a proprietary tithe of its produce, admissible or not?

R. 1. If a Moohummudan ruler obtain a territory by conquest, he is at liberty either to reinstate the original possessors of the lands, taking rents from them; or to transfer them to the possession of some other natives of the country on the same terms, or to distribute them among the soldiers of his army and to fix a tenth of their annual produce to be levied from them. From this it follows that, at the first period of conquest, the lands belong to the *Bytoolmal* or public treasury. The ruler is at liberty, from the time of his accession, to bring the produce of the lands into the public treasury, not conferring on individuals the proprietary right to any part of them, but to let them out in farm. In the same

manner the ruling power has authority to farm those lands which have escheated to him by the death of the ancient proprietors leaving no heirs. The author of the *Buhroorayiq* relating the doctrine of *Sheikh-ibn Homam*, on the subject of lands situated within a city, has the following passage:—"Lands situated within a city are not subject to the payment of land rent; but a tax is levied on them of the nature of house rent, owing to there being no person therein from whom the payment of land rent is due." It appears also to be the case, with regard to Hindoostan, that a great part of the territory has come into the possession of the ruling power by conquest, and that many of the lands appertaining thereto have since become the property of the state, or having been left in the possession of the former proprietors, have, in process of time, been resumed by reason of the death of the incumbents leaving no heirs. There is a certain description of persons called *Mooquddims* or chiefs of villages, and head farmers, who are considered as proprietors; and derive a tithe from the lands which is termed *Nankar* or *Malikana* or the proprietary share of the produce. And as the ruling power is at liberty to relinquish his claim of revenue whenever it may be deemed fit, so also he is at liberty to make over by gift the lands which are the property of the state to any person, who may be considered deserving to hold them as a rent-free tenure. Contrary opinions have been entertained by learned men on the subject of royal grants, as to whether they are the property of the donee or not, but the difference of opinion originates in reasons which it is needless to enumerate in this place. The fact is, that the donee has just so much right as may have been transferred to him, whether it consist in a mere exemption from the payment of rent, or the actual proprietary possession of the lands, formerly appertaining to the

The sale of an *Aymah* tenure is admissible according to the Moohummudan Law, and the *Zemindur* within whose estate it is situated has the right to pre-emption.

state. It is laid down in the *Mooheet*,—"Property obtained by gift in perpetuity is considered in the light of an absolute estate." It is stated also in the *Mookhtusur-ool Mooheet*,—"A person put the following question to *Aboo Huneefa*:—If a king make a gift of property belonging to the public treasury, to a person considered deserving of it, will the property so given belong absolutely to the donee? He said in reply that the donee would be entitled to enjoy it as his own exclusively. The same person put a second question,—If the donee die, leaving heirs, and after his death the ruling power make a gift of the same property to a third person, is the second gift valid or not? *Aboo Huneefa* said in reply that the second gift would be null and void." The true interpretation of the above doctrine is to confine it to corporeal property, capable of actual seizin; and not to extend it to property of an incorporeal nature, or fluctuating property, such as the receipt of rents. The rulers of *Hindoostan*, when they made gifts of lands, executed *Furmans* or mandates, in which they directed their officers in the interior to measure the ground, to define the boundaries, and to deliver them in full possession to the donees; but they did not simply give them an assignment of the produce. Accordingly they (the officers) measured the lands situated in the estates of the proprietors, and defining their boundaries, delivered them to the donees, with the consent of the proprietors, deducting the rent of the lands so separated from the settlement made with the proprietors. According to the question it is understood, that the claim of pre-emption made by the *Zemindar* in this case is founded on the supposition that the *Aymahdar* is absolute proprietor and (as is common in the part of the country in which this question originated) that he is at liberty to sell or farm the lands as he pleases. Under these circumstances the claim of pre-emption made by the

Zemindar in whose estate the lands are situated is legal and valid, by reason of the vicinity and junction of both estates.

Q. 2. The *Shafee* or person who has a right to pre-emption declines to purchase the land at the price demanded by the proprietor, and states that he will not pay for it more than a certain sum. Afterwards the proprietor sells the land to a third person, on receiving his own price. In this case is the *Shafee* at liberty to bring forward a subsequent claim founded on his right of pre-emption?

Refusal to pay the amount demanded by the seller, previous to the sale, does not defeat the right of pre-emption.

R. 2. The claim of the *Shafee* to the right of pre-emption cannot be adduced until after the land has been actually sold to another person, and, from the question, it appears that the *Shafee*, before the sale took place, and consequently before he was entitled to set up any claim to pre-emption, declined to purchase the land, stating that he would not pay more than a certain price for it. Now, as this happened before the sale, and, consequently, before he had any right of pre-emption, his former refusal cannot operate to defeat his claim of pre-emption subsequently preferred; but if, after the sale, he wanted to purchase the ground at the same price which he first offered, and refused to pay the amount which had been agreed upon between the seller and purchaser, such refusal clearly amounts to a renunciation of the right of pre-emption.*

* The above question originated in a suit instituted in the *Zillah* Court of *Shahabad*, the Law Officer of which Court gave it as his opinion, that the *Zemindar* was not entitled to pre-emption, assigning as his reason for this opinion, that the *Aymah* or rent-free lands situated within his estate did not form a fit subject of sale, in as much as the *Aymahdar* was proprietor only of the Government share, which had been relinquished to him by the ruling power, after deducting the tenth part as the proprietary share; and that therefore he had no right to dispose of the absolute property in the lands, but only of so much of the produce as belonged to him, which did not form a subject on which pre-emption

CHAPTER IV.

PRECEDENTS OF GIFTS.

CASE I.

Q. A person dies, leaving three heirs, and during his life-time he executed a deed of gift, conveying to one of them his entire property to the exclusion of the rest. Is such act allowable; and if allowable, is it requisite that the signature of the two other heirs should be affixed to the deed, and is such testimony indispensable to its validity?

Of gifts made in health and in sickness.

R. It is allowable for a person to make over all his property by gift to one of his heirs, if, at the time of making that gift, the donor was in a state of health and sound disposing mind; and, even though at the time

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could be founded. The question having been subsequently referred to the *Patna Provincial Court*, an opinion in opposition to that of the *Shahabad* Law Officer was recorded, which induced a reference to the *Sudder Dewanee Adawlut*. In the reply to the first question, the Law Officers have entered into a disquisition at some length with the view of refuting the opinion that all Royal Grants are necessarily limited in their nature, and of showing that, in some instances, an absolute proprietary right is conferred. This principle seems to be recognized in the regulations of Government, and there is no doubt but that persons possessing Royal Grants, confirmed by competent authority, since the Company's accession to the *Dewanee*, as hereditary rent-free tenures, have the same right to dispose of them as other proprietors have, who pay Government Revenue on their estates. The difference of opinion in the present case seems to have originated in the *Aymahdars* having been considered, on the one hand, as proprietors of so much only of the produce of the estate as would have been the share of Government, had the estate been subjected to the payment of revenue, the proprietary right to the remainder continuing vested in the original proprietor; while, on the other hand, they were considered as having an absolute proprietary right over the whole rent-free tenure, the original proprietor receiving a commutation equal to a tenth part of the produce of the property of which he had been divested, and to which tenth part he would still continue to be entitled into whatever hands the estate passed. The latter opinion seems most consonant to reason and practice. Had the former opinion been held to be the more authentic one, the right of pre-emption would not attach in the case, as then the profits only would have been the subject of sale, and (agreeably to Prin: Shoofaa 3) the right of pre-emption does not apply to moveable property.

he was sick, the gift is valid, provided he subsequently recover from the sickness. But if he died in consequence of such sickness, the disposition holds good to the extent of a third only, of the donor's property; that is to say, the donee will be entitled to one-third only, and the remaining two-thirds will be distributed among the other heirs.* According to the *Hidaya*,—"It is to be observed as a general rule that where a person performs with his property any gratuitous deed of immediate operation (that is not restricted to his death), if he be in health at the time, such deed is valid to the extent of all his property; or if he be sick, it takes effect to the extent of one-third of his property. It is also to be remarked, that a sickness of which a person afterwards recovers, is considered in Law, as health, because upon his recovery it is evident that no one else has any right to his property." The testimony of the other heirs is not necessary to the validity of the deed. It is good to all intents and purposes without their evidence, and its authenticity may be established by the depositions of witnesses who are strangers; besides in no contract is the evidence of witnesses a necessary condition, except in that of marriage. It is merely resorted to for purposes of judicial proof, should it be required.

Witnesses indispensable to no contract but marriage.

CASE II.

Q. A person makes a formal gift to his wife of a twelve anna share of his landed property, and she, having become seized and possessed thereof, afterwards makes a verbal gift of the whole of it to the wife of her grand-son. Is such gift made *ore tenus* valid according to Law? And, in virtue of it, can the grand-son's wife take the property so conveyed?

* But the donee, being an heir, will not be entitled to one-third even, unless the other heirs consent, see Prin: gifts 11.

R. Under these circumstances, if the donor separated the landed property disposed of by gift, and put his wife into complete possession and enjoyment thereof, the gift will be good and valid according to Law. Again if the donee make a verbal gift of the property which she had so acquired, to her grand-son's wife, and put her into possession, such gift must also be upheld as good and valid, provided it be established by the evidence of two men, or one man and two women.*

A verbal gift of land is valid.

CASE III.

Q. Is a gift, whether with or without a consideration, or sale of property not distinctly defined and separated from other property, valid or otherwise?

R. The gift, whether with or without a consideration, of undefined property, provided it admit of being rendered distinct and separate, is invalid; but the sale of such property is allowable, and holds good as far as the right and title of the seller is concerned: but it cannot affect the interests of parties not privy to the contract.

Of undefined gifts and sales.

CASE IV.

Q. 1. A Moosulmaun dies, leaving three wives. By the first wife he had a son and a daughter; by the second wife he had a daughter, and by the third wife a daughter. Before his death he executed a deed of gift of all his property to his three wives, but he had not divided it, or put them into possession. In this case, is the deed above-mentioned valid or not; and under that deed of gift can the heirs of the widows take possession?

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* See Prin: Claims 2.

An undivided gift to three persons, of which they did not obtain possession during the donor's life-time, invalid.

R. 1. The deed of gift is not valid: the heirs of the donor, whoever they may be, inherit his property.*

Q. 2. If any one of the widows, or their heirs, should dispose of a portion of the land which belonged to their deceased husband, by gift or sale, would such sale or gift be valid to any extent?

A gift of more than the owner's right is void, but a sale is valid to the extent of the right.

R. 2. The gift by any of those persons would be invalid; but it is allowable for any of them to sell their own shares, so much as they may legally succeed to by inheritance. They cannot however sell defined portions (by land measurement), of their shares.†

CASE V.

Q. A woman executes a deed of gift in favour of two persons, transferring to them her right and title to her entire property, real and personal. She also granted them permission to make a division of the property so given between themselves; and they accordingly divided the property two or three months after the date of the gift. Is such a proceeding valid, according to law; or was it essential to the validity of the deed of gift, that the division should have taken place simultaneously with the transfer?

* This transaction must have been held to be invalid according to the Moosulmaun Law, whether viewed in the light of a bequest or of a gift. In the former case it would have been contrary to the Law, which prohibits a Moosulmaun from bequeathing more than a third of his property, and, in the latter case, seizin is requisite.

† The reason for this opinion is that, to render gift valid, seizin is requisite; but, as the widows' shares are unascertained, there cannot be seizin of what in itself is unknown and undefined. A sale, on the other hand, is allowed, because it is not necessary to the validity of such contract, that present seizin should take place. Possession may take place after the share sold has been defined and ascertained by partition. In fact it is a sale of the seller's right and title, whatever that may prove to be; but sale specifying the extent of interest by land measurement, when the extent is unknown and undefined, is preposterous and illegal.

In a gift of partible property to two persons, division is essential prior to delivery.

R. The law requires that any thing which is capable of division, when given to two persons, should be divided by the donor, at the time of the gift, or immediately subsequent to the transfer and prior to the delivery to the donees, in order that the objection of confusion* may be avoided and full and complete seizin obtained, which is essential to the validity of a gift. It appears, in this case, that the property given was divided by the donees with the consent of the donor, two or three months subsequent to the date of the deed of transfer. Such a proceeding is not legal. To render it valid, it was essential that the delivery and the division should have been simultaneous.†

CASE VI.

Q. A person executed a deed of gift in favor of his nephew, conferring upon him the proprietary right to certain lands, of which he (the donor) was not in possession, but to recover which he had brought an action, then pending, against his wife. By the same deed he made over to him certain other landed property of which he was possessed. About a month after executing the deed, the donor died, and the donee, in virtue of the gift, lays claim to the litigated property. Under

* The word in the original مشاع strictly signifies indefiniteness. I have here however rendered it by the term "confusion" as more expressive of the signification intended to be conveyed.

† The Law Officer of the *Zillah* Court of *Shahabad* being consulted as to this question, maintained that the proceeding was valid, and the authority for making the division granted by the widow was sufficient to legalize the gift, although such division took place two or three months subsequently to the transfer, and was carried into effect by the donees. Other Law Officers and ultimately those attached to the Court of *Sudder Dewanee Adawlut*, however, having been consulted, the doctrine here laid down was ascertained to be correct. As I have before had occasion to notice an instance in which the opinion of the *Shahabad Mooftee (Moulovee Syud Ahmudee)* was overruled, I think it but an act of justice to that individual to state, that from personal knowledge of his character, I believe him to be a very respectable and learned man.

these circumstances is his claim, under the deed, allowable?

Any gift not in donor's possession during his life-time is null and void.

R. The gift of a thing not in the possession of the donor during his life-time is null and void, and the deed containing such gift is of no effect, because, in cases of gift, seizin is a condition. Gift is rendered valid by tender, acceptance and seizin; but in gift, seizin is necessary and absolutely indispensable to the establishment of proprietary right. According to the *Hidaya,*— "Gifts are rendered valid by tender, acceptance and seizin. The Prophet has said, a gift is not valid without seizin. So also if the thing given be pawned to or usurped by a stranger." So also in the *Shurhi Viqaya,*— "A gift is perfected by complete seizin." As the gift, therefore, is null, the claim of the donee is inadmissible, and the deed is invalid, as far as regards the lands of which the donor was never possessed. But, with respect to the other lands conveyed at the same time, the donee is entitled to them, if the donor put him into possession. If however the donor died, without conferring possession, the claim of the donee to them also is inadmissible.*

CASE VII.

Q. A person gives an undefined part of lands, belonging to a certain village, to the sons of his daughter. He afterwards makes a gift of the whole of the lands belonging to the village, together with all his other property (his son having died before him) to the son of his son. But there were others who had a right of

* The reason of the rule is, that seisin and delivery cannot be effected, when the thing is not in the possession of the donor. It is of no consequence how the possession has been parted with, even though the proprietary right be expressly retained, or claimed, as in the case of a pledge or of an usurpation; but if, after the donor recover it, he put the donee in possession, it is sufficient.

partnership in the property so alienated by him. He had two daughters living at the time he made the gift, and he retained the property during his life-time, the donee being excluded from possession. According to Law, is such gift valid or otherwise?

Gifts are invalid under what circumstances.

R. Under the circumstances stated, the first gift to the sons of his daughter is null and void, from the circumstance of its being indefinite, and of its having been retracted.* The second gift likewise to the son of his son of all the lands, together with all his other property, is null and void, from the circumstance of the donor's not possessing exclusive right, of his having retained possession of the property during his life-time, and of the donee's being excluded from possession. Such gifts possess not the requisite conditions of validity.

CASE VIII.

Q. A person died, leaving two sons and a widow. The elder son, during his life-time, continued in possession of the estate of his deceased father, providing for the maintenance of his mother and younger brother. The elder son died, leaving, besides his mother and younger brother above-mentioned, a widow and a daughter. After his death, his widow, his daughter and his brother entered into an agreement that ten out of sixteen shares of the landed property should belong to his brother and his mother, and that the remaining six shares should belong to his widow and his daughter. The agreement was drawn up and duly attested

* Although agreeably to Prin: Gifts 13, a gift to a relation cannot generally be resumed, yet there is a special exemption made in the case of a donation from a father to a son or grand-son, the resumption of which is declared to be allowable.

by all the persons above-mentioned, except the mother of the deceased, and it does not appear whether she was or was not a party. The parties separately enjoyed the profits of their respective allotments, although no partition of the lands took place. Some time afterwards the brother made an assignment, in the nature of a gift, to a stranger, of the profits of two out of his ten anna share. Is such assignment good after his death, supposing him never to have put the donee into possession during his life-time, and is it good, supposing that he had put him into possession? In either case, was the mother alone competent to dispossess the donee, and how would the case be, if the mother herself, previously to the agreement above alluded to, had made an absolute gift of all her husband's property to the donee in question?

R. It appears from all the circumstances connected with this case, that the gift in question is invalid, and that it is, after the death of the donor, absolutely null and void; and the property so transferred will revert to the heirs of the donor, because it is evident that the produce only was transferred, the ground itself being the common property of all the heirs, it not having undergone division; and according to Law, the gift of unrealized produce without the land is wholly invalid. It is immaterial whether the donee was or was not put into possession of the produce of the common lands; for, in both cases, the gift is invalid, an undefined seizin not being held to constitute legal seizin. Under these circumstances, either the mother, or any other heir of the donor is at liberty to dispossess the donee. The mother was not competent to make over by gift to the donee all the property belonging to her husband, because the estate of her husband was the joint property of all the heirs. A gift even of her own portion is invalid, that be-

ing undefined and not admitting of legal seizin; so that in every view of the case, the gift is entirely null and void. *Shurhi Viqaya,*—" The gift of milk in the udder, of wool upon the back of a goat, of grain or trees upon the ground, or of fruit upon trees, is in the nature of the gift of an undefined part of a thing; and such gifts are prohibited unless separated from the property of the donor, and seizin be subsequently made of them." But, as, in this case, the trees were not cut down, and the donee did not make regular seizin during the life-time of the donor, the heir of such donee is not competent to come in and to establish the validity of the donation by the performance of any act on his own part; because he is quite a stranger to the transaction. The acceptance was not expressed by the heir, but by the ancestor, who died before separation and seizin. In the *Hidaya,* in the chapter treating of retractation of gifts it is stated,—" If the donor should die, his heirs are strangers with respect to the contract, since they made no tender of the thing given." It appearing therefore that the property was not separated and delivered into the possession of the donee, the right was not transferred from the donor during his life-time, and after his death it devolves on his heirs. It is laid down also in the *Hidaya,*—" Seizin in cases of gift is expressly ordained, and consequently a complete seizin is a necessary condition, but a complete seizin is impracticable with respect to an indefinite part of *divisible* things, as it is impossible, in such, to make seizin of the thing given without its conjunction with some thing that is not given, and that is a defective seizin." So also in the *Viqaya,*—" Gift is perfected by complete seizin." And in the *Shurhi Viqaya,*—" A gift of part of a thing which is capable of division is not valid unless such part be divided off, so that seizin may be definite and not include any thing else." It is evident therefore that

The gift of trees growing on the land of the donor, or of their unrealized produce is invalid without the gift of the land.

a seizin of undefined property is itself indefinite, and cannot be considered valid.*

CASE IX.

Q. The father of an infant child (who is her legal guardian) residing at a distance of three stages from her, the mother of such infant makes a gift to her of certain property. On account of the extreme tender age of the donee, acceptance of the gift did not take place on her part, and, by reason of her minority, the mother, that is to say the donor, with whom the infant was residing, remained in possession of the property given, after the gift had been made. Under these circumstances is such gift, seizin of which had not been made by the donee, valid and binding or otherwise?

Case of gift to a minor donee, the legal guardian being absent.

R. If a mother make a gift to her infant daughter, who is residing with her, of property which is distinctly her own; if, by reason of the minority of the daughter, acceptance did not take place on her part, and the property, from the same cause, continued in the possession of the donor, and if the father was, at the time of the gift, at a remote distance, the gift is legally valid and binding. The seizin of the mother will, under such circumstances, be equivalent to that of her daughter, and, on her signifying her consent, the gift is complete without the donee's seizin. This doctrine is maintained in the *Hidaya* and various other legal authorities. In the *Jouhura Nyura*, in the chapter treating of marriage,

* The principle of the Law in this case is that, in the instance of trees growing on the land and not cut down, they are mixed with the land itself, which is other property, and which formed no part of the gift, and consequently, that seizin of the gift cannot take effect without including in the seizin something which formed no part of the gift. The same objections apply to the gift of unrealized produce, independently of which, the gift of any thing to be produced *in futuro* is null and void, even though the means of its production be in the possession of the donee (See Prin: Gifts 5 and 6).

quotations are introduced from the *Moosfee* and the *Futawa-i-koobra* in explanation of the term *Gheebut-i-moonqutaa* or remote distance, in which it is held to mean, if the guardian of the infant be at the distance of three stages, and it is stated in the *Futawa-i-surajeea*, in explanation of the same term, to signify, if the guardian be at the distance of three days' journey, and it is explained in the *Rusail-ool-arkan*, that one stage means as far as a person may be able to travel, at a moderate pace, in the shortest day of the year, between morning and the setting of the sun.

What constitutes absence.

CASE X.

Q. Should the property left by two brothers devolve entirely on their widows? and if the whole property should not devolve on them, to what portion will they be entitled, and to whom will the remainder go? Are the widows entitled to dispose of their late husbands property by gift, and if they have a right to do so, is the deed of gift, executed by them, in favour of one of the husbands heirs, available in Law?

R. If the property of the husbands be insufficient to satisfy the debt of dower which their widows have a right to claim, the whole property will devolve on them; and if it should be more than sufficient for this purpose, the property will, in the first instance, be applied to satisfy their claim, and, after such satisfaction, if there remain any surplus, it will be made into four parts, of which one-fourth of their respective husbands estate will go to the widows in right of inheritance, provided there are no children nor son's children. If no dower should be due to the widows, and their claim to dower should have been otherwise satisfied, one-fourth of the whole property will go to them, and the remaining three-fourths will go to the other heirs of the husbands.

If the widows were seized of their husbands property in virtue of proprietary right, as for instance in satisfaction of their dower, in this case they are entitled to dispose of it by gift; otherwise they can only dispose of it to the extent of their own interests, and their gift of the whole, in favour of one of the husbands heirs, is inadmissible. According to the first supposition, the property given, after complete seizin by one of the husbands heirs, will belong exclusively to him as donee. According to the second supposition, the donee will take the property to the extent only of the donors interests, and the remainder will go to such person or persons as may be entitled thereto in virtue of their right of inheritance; for, in this case, the gift is not rendered null and void by reason of the donors not possessing exclusive proprietary right, in as much as the indefiniteness was supervenient.* Although the widows, at the time of the execution of the deed of gift, were not seized of the property, yet if, agreeably to their desire, the donee, in pursuance of a Judicial Decree, became subsequently seized thereof, the fact of the donors having been out of possession at the time of making the gift is not sufficient† to invalidate it. It is laid down in the *BuhrooraYiq* on the subject of the gift of outstanding debts,—"A man makes over his outstan-

Of supervenient indefiniteness in case of gift.

Gift of property not in possession of the donor, when valid.

* The meaning of this is that, when a person makes a gift to another of property, of which, apparently, the donor was the sole proprietor, but, to a part of which, the right of a third person was established, at a period of time subsequent to the gift, the donee will take to the extent of the interest of the donor, notwithstanding the supervenient indefiniteness, or, in other words, notwithstanding the fact of its being subsequently ascertained, that the donor was not sole proprietor of the property given at the time of the gift. It would have been otherwise had the right of a third person been recognized to exist at the time of the gift, which would in that case have been null and void *ab initio.*

† But it is nevertheless necessary that possession should be given by the donors, as soon as they have it in their power so to do, although a new formal declaration of gift is not requisite, and it is moreover requisite that the property should be in existence at the time of the gift, although not absolutely necessary that it should be in the possession of the donor. See Prin: Gifts 5.

ding debts by gift to a person who is not indebted to him, directing the donee to collect such debts and take them for his own use, this gift is valid." It is evident that, in such case, the amount of the debts, so transferred, was not in the donor's possession, but the gift is nevertheless admissible, and the donee, after realizing the debts, becomes sole proprietor of the amount. The case in consideration is analogous, as, from the terms of the deed of gift, it appears that the donors directed the donee to make complete seizin.

CASE XI.

Q. 1. If the master of a slave make a gift to such slave, of all his property, does the Law require, as a condition to the validity of the gift, that he should, in the first instance, emancipate the slave?

Of a gift to a slave.

R. 1. If the master of a slave make a gift of all his property to such slave, without having previously emancipated him, such gift will be null and void, because the master is proprietor of every thing acquired by his slave. If a master therefore intend to make a gift to his slave, the Law requires that he should emancipate him in the first instance.

Q. 2. A deed of gift recites, that the donors have positively, and without any reserve, given to the donee, all the lands situated within a certain place. Is such deed vitiated, by the circumstance of its not specifying the boundaries of the lands?

In a deed of gift of lands, not necessary to specify their boundaries, if well known

R. 2. If the boundaries of the lands given are well known, and do not require specification, and no doubt exists regarding them, it is not necessary to specify them at the time of making the gift. If mention of the boundaries was omitted in the deed of gift, the omis-

sion must be attributed to an error on the part of the scribe, because it is customary to insert the mention of the boundaries in legal documents of this nature. But such error does not vitiate the gift. If there exist a doubt respecting the boundaries of the lands given, a specification of them at the time of gift is necessary.

Q. 3. Supposing Gholam Hoosein Khan to be the heir of Budun Khan and Asalut. Is the circumstance of his absence, at the time they made the gift to the plaintiff, sufficient to invalidate such gift?

Consent of donor's heirs not requisite to a gift.

R. 3. When a person gives his property to a stranger, neither the knowledge of the heir, nor his presence, is necessary to render the gift good in Law.

Q. 4. The plaintiff was educated from his infancy in the house of Budun Khan. He relinquished his family, his tribe, and his religion, and became a convert to the Moohummudan faith. As Budun Khan and his wife were old and infirm, and had no children, he managed all their concerns, and every thing was at his command and disposal. Those persons made a gift to him of the whole of their property and effects, not of a part only, (about which there might have originated a doubt, as to what was intended to be given, and what retained.) Under such circumstances, does the law require, that each individual article should have been pointed out, and that specific designation and mention of each of them should have been inserted in the deed of gift.

Specification not requisite where the gift comprises the whole property of the do-

R. 4. If the articles given were clearly known to the donors and the donee, and the donee accepted and took possession of them, their specification is not necessary to the validity of the gift. In drawing up legal docu-

ments, specification is usual; but, if omitted, the gift itself is not, according to law, invalidated.

nors, and is made in favor of only one donee.

CASE XII.

Q. A person had two sons, one of whom died before him, leaving a wife and a daughter. The person above alluded to made a gift of half of his property to the widow and daughter of his deceased son, without defining their respective shares. He remained in joint possession of the property with them, and, some time afterwards, he took from the donees an agreement, nominating him to the management of the property given. During his life-time he regularly paid to the donees the profits of half the property. Under these circumstances is the undefined gift to the two donees in question good and valid, according to Law, after the decease of the donor?

R. It appears in this case, that the deceased proprietor made an undefined gift of half his property to the widow and daughter of his deceased son, without specifying their respective shares, and that he caused them to execute an agreement, nominating him (the donor) to be manager of the half given to them, continuing however during his life-time to give them regularly half the profits; under these circumstances, if the property in question be of an indivisible description, such as a well or a pond, the gift will be valid. But if the property, which is the subject of the donation, was divisible, such as land, and there were two donees, whose respective shares were not defined, all authorities concur in admitting the validity of the gift, if the donees were paupers or in indigent circumstances, and it cannot be resumed after the death of the donor; but if the donees were rich, the gift will be invalid, and seizin therefore will be of no effect. The death of either the

Gift of undefined property (tho' divisible) to two paupers is valid.

donor or donee operates to preclude the resumption of a gift.*

CASE XIII.

Q. 1. Two persons are joint proprietors of an estate. The one makes over to the other the proprietary right to his share. Does the circumstance of the donor's having a joint interest invalidate the transfer.

Objection of indefiniteness not applicable to a gift made by a person to his sole partner.

R. 1. Supposing the donor to have been of sound disposing mind, the circumstance of his being joint proprietor does not by any means invalidate the transfer; because, in this instance, the objection of indefiniteness, arising from a confusion of several interests, which renders a transfer invalid, does not exist. This supposes that there was no other person possessing a proprietary right in the property transferred, except the donor and donee.

Q. 2. Supposing the donee to have been an infant at the time of the transfer, will seizin on his behalf by the brother of his grand-father, be a sufficient seizin according to Law?

Of a gift by a father to his minor son.

R. 2. Such seizin will not be deemed legally sufficient, because the Law requires seizin by the donee, except in the case of a gift made by a father to his minor son,

* It is a Principle of Law (See Prin: Gifts 7) that, in the case of a gift to two or more donees, the interest of each should be separated and defined. The exception to the rule, in the case of a charitable gift to paupers, is accounted for by two arguments, the casuistry of which may perhaps be excused for the sake of their charity. According to one authority, the reason is, that the Almighty Author of all Bounty is the immediate and sole donee, from whom it reverts to the poor; while according to another authority the reason is, that a charitable gift resembles a *Hiba-bil Iwuz* or gift for a consideration (See Prin: Gifts 15) in which mutual seizin not being necessary, the objection of indefiniteness (which is a preventative of seizin) does not apply. The consideration, it is maintained, consists in the pleasure resulting from the consciousness of having performed a virtuous action.

and a few other specially excepted instances. According to the *Shurhi Viqaya,*—"A gift made by a father to his child is perfected by the mere declaration of it." The gift of a stranger to such child is perfected by his seizin, if he have discretion, or by the seizin of his father or grand-father or mother, provided he is residing with her, or even by the seizin of a stranger who has the care of the minor. Such is the doctrine maintained in the *Hidaya* and other authorities. The meaning of it is, that if a father make a gift to his child, that is to say his minor son, who may not have discretion, consisting in the capacity of distinguishing between that which is advantageous for him and the reverse, such gift is completed by the mere declaration of it, and there is no necessity for acceptance or seizin on the part of the donee. But if a stranger make a gift to a child, such gift will be perfected on the seizin by the donee, if he have discretion, or by seizin made on his behalf by his father or grand-father, or guardian appointed by them, or failing those persons, by his mother, or by the seizin, on his part, of a stranger who has the care of his education and under whose protection he lives. The seizin therefore by the grand-father's brother will not be legally sufficient, unless the donee, during his minority, was living under the protection of that relation.

Seizin of guardians sufficient in certain cases.

Q. 3. Supposing the grand-father's brother not to have surrendered possession to the minor until he attained the age of majority, will this circumstance invalidate the transfer, admitting that the minor was living under the protection of that relation?

R. 3. Such circumstance will not invalidate the transfer, because in point of fact the seizin of the grand-father's brother is equivalent to the seizin of the minor.

And of protectors.

Q. 4. If, at the time of transferring the proprietary right, there was a third sharer in the estate in question, will this circumstance invalidate the transfer of the donor's share?

Gift how invalid by reason of indefiniteness.

R. 4. Such circumstance will, undoubtedly, invalidate the transfer, because it superinduces the legal objection of indefiniteness. Unless the share of the donor be separated and parcelled off from the joint property, either previously, or subsequently to the gift, it operates, to prevent a legal transfer of proprietary right.

CASE XIV.

Q. A person died, leaving as his heirs, two widows and a daughter. A few years after his death, both the widows made over by gift to the daughter, all their right and title to the property left by the husband. She (the donee) executed an agreement in favour of her mother, engaging to provide her during her life-time with food and raiment, and after her death to perform her funeral ceremony and obsequies. The donors caused the rents of the estate to be paid to the donee, who afterwards, before the death of her step-mother, disposed of the landed property so acquired, by gift to the defendant, and he, four months after the death of the donor, (who died before her step-mother) took possession of all her property, in virtue of the gift. It is proved, by the testimony of witnesses, that the donee is a son of the donor's uncle, but whether the son of a paternal, or of a maternal uncle, does not appear. Now the mother of the first donee (that is to say one of the widows who survives) wishes to revoke the gift which she made in favour of her daughter. Under these circumstances is she, according to the Moohummudan Law, competent to resume the gift, and to recover the estate from the possession of the second donee or not?

R. According to Law, the gift which was made by the widows of their legal shares is valid and good. It is laid down in the *Viqaya*,— "If two persons jointly make a gift of a house to one man, it is valid." The agreement executed by the daughter in favour of her mother does not invalidate the gift; as is declared in the *Hidaya*,—"Gifts are not affected by being accompanied by invalid conditions. The gift is perfected by the donors delivering the possession of it to the donee." So also in the *Viqaya*,—"Gift is perfected by complete seizin." The donor is not entitled to revoke the gift which she made in favour of her daughter, because, in this case, there are two obstacles to resumption; first: the death of the donee; agreeably to the doctrine laid down in the *Cunzood duqaiq*,—"One obstacle to the resumption of a gift is the death of one of the parties;" and secondly, relation within the prohibited degrees; as is stated in the *Hidaya*,—"If a person make a gift of any thing to his relation within the prohibited degrees, it is not lawful for him to resume it."* The donee made over all her property by gift to the son of her uncle, who did not however make complete seizin of it during her life-time; on which account her gift in favour of him is null and void; as is laid down in the *Ibrahim Shahee*,—"A gift cannot be perfected but by the complete seizin of the donee." So also in the *Hidaya*,—"If the donee take possession of the gift in the meeting of the deed of gift, without the order of the giver, it is lawful, upon a favorable construction. If, on the contrary, he should take possession of the gift after the breaking up of the meeting, it is not lawful, unless he have the consent of the giver so to do." The gift, which was made by the donee in favour of her uncle's son, being thus null and void, the property in

Of a gift with invalid conditions.

A gift from a mother cannot be resumed, nor any gift after the death of the donee.

But it may revert to her as heir, in de-

* See Prin: Gifts 13.

fault of the donee's seizin.

dispute should be considered as the estate of the daughter, and it should be first applied to pay for her funeral ceremony and burial, without superfluity of expence, yet without deficiency; next to the discharge of her just debts, then to the payment of her legacies out of a third of what remains, after her debts are paid; and if there remain any surplus it should be made into three parts, of which one will go to her mother as her legal share, and the remaining two to the son of her uncle (if he be the son of her paternal uncle) as residuary; otherwise he will not be entitled to any share of the inheritance, and the mother will take the whole property left by the daughter, in satisfaction of her legal share and on account of the return.*

Share of a mother with a paternal uncle's son.

And with a maternal uncle's son.

CASE XV.

Q. A person, after the death of his first wife, without any relinquishment on her part, or satisfaction made by him of her claim to dower, marries a second wife, and then confers on such second wife the proprietary right to his entire property, in lieu of dower. He however does not put her into possession, but retains it himself. Afterwards, when of a sound disposing mind, he executes a deed conveying to the heirs of each of his wives the joint proprietary right in his estate, not reserving any part of it. Under these circumstances, is the gift in lieu of dower, made by him to his second wife, to be considered valid and to be upheld, notwithstanding the debt due by him to his first wife on the same account; or is he at liberty, notwithstanding and subsequently to such gift, to distribute his property among the heirs of both his wives?

* The reason of this is, that a paternal uncle's son is a residuary heir, and inherits together with a legal sharer; whereas a maternal uncle's son ranks among the distant kindred only, who are altogether excluded from the inheritance, if there be any legal sharer entitled to the return.

R. If the person, whose first wife was deceased, in making the gift to the second wife, had expressed himself to this effect; that he had made a gift to, and conferred on her, the proprietary right to his entire property, in exchange of a certain portion of her dower, this is not, according to Law, a gift in consideration of an exchange, but it is a contract of sale, both as to the condition and effect. Such is the universally admitted opinion, and, in a contract of sale, seizin is not a requisite condition. The circumstance of his being indebted to his former wife, does not incapacitate him from concluding a contract of this nature, because a debtor is not precluded or interdicted from the disposal of his property. Such contract would therefore be upheld, the thing sold must be considered to be the property of the purchaser, and the seller is not at liberty to make a subsequent disposition of the property sold, among the heirs of his two wives. But if he had expressed himself to this effect; that he had made a gift to and conferred on her the proprietary right to his entire property, on condition, that she would give to him a certain portion of her dower, and the donee accepted the condition, it would be a gift on stipulation. According to Law it is considered in the light of a gift, as to the condition, and sale as to the effect. Seizin is requisite to its validity, and the gift cannot be said to be established until the parties shall have made seizin, but the property conferred remains, as formerly, at the disposal of the donor. He will, therefore, be at liberty to make a subsequent disposition of it among the heirs of his two wives, because an owner has unlimited power over his own property. Authorities extracted from the commentary of *Chulpee*,—"I have given to you this slave for this garment of yours or for one thousand dirms." To which proposal the person addressed assents. This is a contract of sale both as it regards the condition and

Definition of *Hiba-bil Iwuz* or mutual gift.

Resembles a sale, and seizin is not requisite.

Definition of *Hiba-ba Shurt-ool Iwuz* or gift on stipulation.

Resembles a gift, and seizin is requisite.

Authorities in the case of a *Hiba-bil Iwuz.*

the effect, agreeably to the doctrine maintained in the *Kifaya*, and, universally, in other authorities. So also in the *Shurhi Viqaya*,—" A contract of sale is established by conferring a right to one thing in lieu of another." So also in the *Hidaya*,—" The expressions I have given you this for that," or " take it for so much" have the same signification as the terms, " I have sold or purchased from you." So also in the *Viqaya*,—" Where these exist the sale is complete." By these are meant declaration and acceptance, and, when these are found to exist, the sale is binding; from which it follows that seizin is not a condition, and where these do not exist the sale is not binding. According to the *Shurhi Viqaya*, a person of disposing mind is not inhibited by means of imbecility or profligacy or debt. This is the doctrine of *Aboo Huneefa*. But, according to *Shafei* and the two disciples, a man may be inhibited by reason of imbecility. According to the same authority, when creditors petition a Court of Justice to restrain an insolvent debtor from alienating his property by sale or other obligation, an order to that effect may be granted. According to *Shafei*, a profligate person may be restrained with a view to his correction. According to the commentary of *Chulpee*, it is necessary, in the case of an inhibition for debt, that the creditors should pray for the restraint being laid-on.* But, in the present instance, it does not appear that the creditors made any petition to that effect. In the *Viqaya* it is stated that a gift on stipulation is a gift, as it regards the condition, and therefore seizin is requisite, and it is moreover stated to be a sale, as it regards the effect. In the *Shurhi Viqaya* a definition is afforded of what constitutes a gift on stipulation, as if one man should say

Of inhibition in cases of imbecility.

And in cases of profligacy.

And in cases of debt.

Authorities in the case of a *Hiba-baShurt-ool Iwuz*.

* Even in this instance, however, the inhibition cannot be general, but the debtor may be restrained from doing any act manifestly collusive and prejudicial to the interests of his creditors. See Prin: Debts 7.

to another; "I have given you this thing on the condition of your giving me that." It is also laid down in the *Hidaya*, that, in all cases of contract of gift on stipulation, mutual seizin of each of the articles exchanged is necessary.*

CASE XVI.

Q. A respectable individual, who died seven or eight years ago, had three wives. By his first wife he had a son and two daughters; by his second, two sons and three daughters, and by his third, only one daughter. The first wife with her children are living, and are in possession of all the property left by the deceased. The second and third wives died before their husband, but their children survive, and those by the second wife now lay claim to a sum little short of fifteen thousand rupees, that is to forty-nine out of ninety-two parts of the estate. The first wife and her children, who are the defendants in the present action, plead, in answer to the claim, that some years previous to his death, the deceased husband made over all the property, moveable

* This case exhibits a distinction between the terms of *Hiba-bil Iwuz*, or mutual gift and *Hiba-ba shurt-ool Iwuz* or gift on stipulation. See Prin: Gifts 15 and 16. The distinction would at first sight seem to be merely of a verbal nature; but from the nature of the terms used it does not appear to be wholly groundless. They say that *Hiba-bil Iwuz* is a sale in every sense of the word. In sale mutual seizin is not requisite to render the contract valid, and the terms in which a contract of this kind is entered into, imply that the articles opposed to each other are present and that there is no danger of either party suffering from the other's fraud. "I have given you this for that" implies that the consideration is present, and that the person will take care to receive it before parting with his property; and the law therefore annexes to it the quality of a sale, both with regard to the condition and effect. *Hiba-ba shurt-ool Iwuz* they say, is a contract of a different description. The terms used imply a contingency. Thus "I have given you this *on condition* of your giving me such a thing." Now, in this contract it is observed, that, as to the condition, it has the property of a gift, in which seizin is requisite; otherwise, if it were valid and binding without such condition, the consideration might be withheld, and it might thereby become as it were a *nudum pactum*. As to the effect, this contract is declared to have the property of a sale, that is to say, after reciprocality of seizin, it becomes in effect a sale.

and immoveable, ancestrel and acquired, to his first wife, by a deed of *Hiba-bil Iwuz* in exchange for three lacks of rupees due to her on account of dower, which deed was duly authenticated and attested. In support of this plea the defendants filed the deed, assigning the property as a *Hiba-bil Iwuz.* It appears, from the evidence of the witnesses adduced on the occasion, that the deed in question was executed by the deceased husband, to appease the anger of his wife, who, having taken umbrage at some domestic occurrence, was on one occasion, about to leave her husband's house and to retire to that of her brother. It further appears from the evidence in this case that, although the deed purporting to be a *Hiba-bil Iwuz* recited that the contracting parties had made mutual seizin of the articles opposed to each other, yet that, in point of fact, the husband remained in possession of all his property till his death. Under these circumstances, can such a deed operate to prevent a devolution of the property agreeably to the Laws of Inheritance?

Gift is of two kinds.

Of unqualified gifts.

Of qualified gifts.

Of *Hiba-ba Shurt ool Iwuz.*

R. Gift is of two kinds—It is either unqualified and void of any consideration, as, where the donor makes an absolute gift of property; in which case seizin of the property given is essential to the validity of the gift: or qualified, of which there are two descriptions, first, *Hiba-ba Shurt-ool Iwuz,* which is accompanied by the expression of a condition, and consists in a person offering to give to another some thing on *condition* of his receiving from the donee some thing else. In this case, also, seizin of the thing given is requisite, and it is also essential that it should be defined and separated from the rest of the donor's property. But this description of gift resembles a gift in the first stage only, and sale in the last stage; that is, after the receipt of the consideration. Such a gift therefore, unaccompa-

nied by seizin, cannot operate to prevent the devolution of the property agreeably to the Laws of Inheritance; after the satisfaction of all prior claims on the estate, such as debts, dower, legacies, &c. Secondly, *Hiba-bil Iwuz*, which consists in a person saying to another that he has given such a thing for such a thing, as for this cloth, or for this slave, or for a thousand dirms; and this description of gift resembles a sale in both stages, agreeably to the universally received opinion; in which case the seizin of the donee is not an essential condition. It appears also that the deed executed by the husband was of this description, and if it be duly proved, it will certainly supersede all claims of inheritance. This opinion is delivered in conformity to the doctrine contained in the *Hummadeea*, the *Kholasa* and other Law Tracts.*

Of *Hiba-bil Iwuz.*

CASE XVII.

Q. A person dies, leaving two wives; but during his life-time he made a gift to one of them of all his property, including his household effects, money and jewels, in lieu of the dower stipulated for her at her nuptials. On the death of the individual above alluded to, his two wives (the one to whom he made the gift having had by him one daughter, and the other two daughters) enter into a dispute relative to the succession to his property. Under these circumstances, is the gift of the husband valid, or in what proportions should the estate be distributed?

R. It appears that the gift, in this case, was of that description of gift which is technically termed in Law a *Hiba-bil Iwuz* or gift for a consideration, and this species of gift resembles a sale both in principle and

* Prin: Gifts 15 and 16.

effect; but there is a doubt as to the legality of this transaction, from the circumstance of the articles opposed to each other consisting partly of money, which constitutes a *Sirf* sale. In this description of contract seizin on the spot is essential to its validity. If seizin was made, the transaction must be held to be valid; if not, it must be declared null and void, and both the parties have a right to recede from the contract. So also the heirs and creditors are at liberty to set it aside and resume the property parted with, on repaying the consideration for which it may have been given, until which time, the property will remain as a pledge in the hands of the purchaser, but, when the consideration is restored, it will become subject to the Law of Inheritance; and, in this event, it should be made into forty-eight parts, of which each widow is entitled to three and each daughter to fourteen.

Of *Hiba-bil Iwaz;* money forming part of the consideration on both sides.

CASE XVIII.

Q. A certain woman made a gift of her estate to another woman, with this condition reserved, that the donor was to enjoy the property during her life-time, and, that on her death, it was to devolve on the donee. Agreeably to this gift, the donee entered upon the estate, made the collections of the rents and profits, and delivered them to the donor. The donor, however, all along kept possession of a small portion of the estate. According to Law, is such gift valid or otherwise? and under it, had the donee power to alienate the estate by sale, and would a deed of sale executed by the donee become valid and binding, from the circumstance of the donor's having become a party thereto, by formally affixing her name to the deed? and, after that, if the donor make a gift of the same estate to a third person, should such gift be upheld or set aside?

R. A gift is not perfected except by complete seizin. It appears, in this case, that the donor retained a portion of the estate and put the donee into possession of the remainder. This does not constitute delivery sufficient to establish the validity of the gift. Had the donor put the donee into possession of the whole of the estate, the gift would have been complete and the condition reserved, null and void; but, as the donor retained a part in her own possession, complete seizin cannot be established, without which a gift is of no effect; but as the donor formally affixed her signature to the deed of sale executed by the donee, such act is indicative of her being a consenting party to the sale, and that the contract was entered into by the desire of the donor, as well as of the donee. Under these circumstances the deed of sale must be considered valid and binding, and the contract founded thereon must be upheld. The donor has no authority afterwards to dispose of the same estate to another person.*

In case of an invalid gift, if the donor attest a deed of sale executed by the donee, the sale will hold good.

CASE XIX.

Q. 1. A woman made a gift of her entire property to her grand-son, a child aged five years, and five years afterwards, she made a distribution of it among all her heirs, including the above-mentioned grand-son. Is such a gift of her property to one heir legal and valid, and is she afterwards at liberty to resume it?

R. 1. Such gift is legal and valid, and does not admit of resumption, because between the grand-mother and her grand-son, there exists a relation within the prohibi-

Of a gift by a grand-mother to her grand-son.

* The decision in this case would seem at first sight to be contrary to the general doctrine of gifts; but, although not expressly mentioned, the reason for maintaining the validity of the sale was the fact of the donor's having parted with the possession of the thing given and made it over to the donee to be delivered to the vendee, when the gift ceased to be invalid, and it is a rule that resumption cannot take place after the property shall have been transferred to a third person.

ted degrees, and such relation is an obstacle to resumption. Her distribution of the property among the heirs generally, five years after the gift, is null and void, and the former gift will remain in full force. According to the *Shurhi Viqaya,*—"To perfect the gift of a thing which is in possession of the donee, new seizin is not requisite. The gift of a father to his child is perfected by the mere declaration. Whatever gift is made by a stranger to him, he should take possession of, if possessed of sufficient discretion to do so, or his father or grand-father should take possession of it on his behalf, or the guardian appointed by either of them, or his mother, provided he be residing with her, or a stranger in whose house he is educated." In the same authority the obstacles to resumption of gift are stated to be seven. 1st. The incorporation of an increase with the gift. 2nd. The death of the donee. 3rd. The donee giving the donor a return or consideration. 4th. Alienation of the gift. 5th. The parties being husband and wife. 6th. Relation within the prohibited degrees. 7th. Destruction of the thing given.*

Of irrevocable gifts.

Q. 2. The grand-mother and the mother of the plaintiff in this case, that is to say the donee, after the death of the donee's father and five years after the date of the the gift, make a distribution of the property among the other heirs. Is the distribution under these circumstances valid?

R. 2. The gift having been already declared to be legal, and the retractation of it inadmissible, the distribution subsequently made must necessarily be null and

* See Prin: Gifts 13. In that principle only five impediments to resumption are enumerated, but the fact of the parties being husband and wife, was included in the prohibition relative to relations. The destruction of the thing given was inadvertently omitted. The death of the donor also operates as an impediment.

void. The question is not at all affected by the fact of the donee's father being dead or in existence at the time. The authority above quoted from the *Shurhi Viqaya* is sufficient to support this answer, in addition to which the following authority from the *Hidaya* is applicable:—"If a father make a gift of something to his infant son, the infant, in virtue of the gift, becomes proprietor of the same, provided, &c. The same rule holds when a mother gives something to her infant son whom she maintains, and of whom the father is dead, and no guardian provided, and so also with respect to the gift of any other person maintaining a child under these circumstances. If a stranger make a gift of a thing to an infant, the gift is rendered complete by the seizin of the father of the infant. If a person make a gift of a thing to an orphan and it be seized on his behalf by his guardian, being either the executor appointed by his father, or his grand-father, it is valid. If a fatherless child be under charge of his mother, and she take possession of a gift made to him, it is valid. The same rule holds with respect to a stranger, who has the charge of an orphan. If an infant should himself take possession of a thing given to him, it is valid provided he be endowed with reason."

Who can make seizin on behalf of an infant.

CASE XX.

Q. 1. Two brothers lived together in a state of union. They were both married, and one of them had a son and three daughters. Both brothers joined in conveying their entire property to the son above-mentioned (who was only seven years and a half old at the time), executing a deed of gift in his favor to that effect. Is such gift valid according to Law?

R. 1. The gift by two persons to a minor, one of whom being his father and the other his uncle, of their

Of gift by a father and

uncle to an infant.

joint property, is valid, provided that there was the complete seizin that is requisite, that is to say, provided the uncle relinquished all participation in the property conveyed, resigning it to the father, who is empowered to make seizin on behalf of his minor son; but the gift is invalid if the uncle continued associated with the father in possession. Notwithstanding this doctrine, if a father make a gift, during his last sickness, of all his property to one child, in exclusion of the others, it is wholly illegal, because, in such a state, the heirs in general have an inchoate right to his property, and consequently such disposition is unauthorized. If he make the gift when in health, the donor acts immorally and oppressively, and it is sinful in an ancestor to act injuriously towards his heirs.

And if made in last sickness.

If it exclude other heirs, immoral.

Q. 2. The donor having been proved to be guilty of injustice under the circumstances stated, will the gift nevertheless be upheld as good and valid?

But must be maintained.

R. 2. The gift of the entire property to one heir to the exclusion of all the rest, supposing the existence of the conditions noticed in the answer to the preceding question, is good and valid, notwithstanding the immorality of the act, according to the tenets of *Aboo Huneefa*. But *Naaman*, son of *Busheer*, the reporter of the traditions, and *Imam Aboo Yoosuf*, according to the opinion reported of him, and *Moohummud Amjud*, the author of the *Futawa Qinoojee*, deeming such gift to be an act of cruelty and oppression, have declared it inadmissible, and have pronounced that, in such a case, an equal distribution should be made among the heirs generally. Authorities for the above doctrines: In the *Futawa Surajool Mooneer*,—"A gift by two or more persons of a house to one individual is valid." In the *Hidaya*,—"If two persons jointly make a gift of a house

Authorities for its validity.

to one man it is valid." In the *Futawa Surajool Mooneer,*—" It is necessary that the gift should be divided off, and distinguished at the time of seizin." In the *Doorur-i Mokhtar,*—" If, during a period of health, a person make a gift of all his property to one child the gift is valid, but the donor has acted sinfully." A tradition of *Naaman Bin Busheer* is related in the *Mishqat-i Shureef* to the following effect:—" When I was only seven years old, my father made me a present of a slave, to which my mother objected. On which the prophet was called to witness, and he was made acquainted with the circumstances. Upon this he asked my father, if he had any offspring besides myself, and a reply being made in the affirmative, he was next interrogated if he had made a similar present to each of his children. He replied that he had not. On which the prophet observed that this was injustice. The prophet said,—" Return home, fear God and make impartial distributions among your children." In the *Doorur-i Mokhtar,*—" A superiority of affection manifested to one child above others is not blameable, because that is a natural impulse. So also in the case of gifts, unless injury to the others be intended. If such was intended, an impartial distribution should be made. According to the opinion of the latter, the gifts made to a daughter should be equal to those made to a son, which opinion has been approved." By the latter is meant *Aboo Yoosuf,* whose opinion is generally followed in judicial matters. As injury is declared to be the cause of the equalization, in every case of partial distribution, where injury appears to have been the object, it follows that an impartial distribution should be directed. But, where a man gives all his property to one child, the injury must of course be greater *a fortiori. Moulana Moohummud Amjud,* who has written a legal commentary, entitled the *Futawa Qinoojee,* expresses

And its immorality.

himself thus:—"It is a maxim that oppression practised by an ancestor towards his heirs is not allowable; but it is not generally understood merely to signify (as it really does) that the gift by a father, while in health, to one son of his entire property, or of any portion exceeding his due share, is injustice towards the others."

CASE XXI.

Q. 1. A person, having two wives, executes a deed in favor of the first, transferring to her all right and title to his property, real and personal, in satisfaction of her dower. Two years afterwards, he executes another deed, in favour of his second wife, transferring to her the right and title to one moiety of the said property, in satisfaction of her dower, having obtained the written permission of his first wife to do so. In this case will the second wife be entitled to half his estate, on his decease, in virtue of her claim of dower?

Gift to one wife, by a husband, of property belonging to another, not sufficient, tho' made by the written permission of the latter.

R. 1. The husband, in this case, transferred to his first wife the right to his entire property in satisfaction of her dower, previously to his assignment of a moiety of it to his second wife. This second transfer therefore is null and void, because the proprietary right to the thing given, had passed from the husband and had vested in his wife. This is supposing that there was no permission granted on her part. But, admitting the alleged writing containing the permission to be fully authenticated, it merely states that the husband is at liberty to execute a deed assigning to his second wife half of the property, which he had before transferred to his first wife, in satisfaction of her dower; and it will not avail the second wife, because, the consent of the first is wanting to give effect to the deed *after* its execution by her husband. This does not appear to have been obtained, and the mere written permission is not

legally sufficient to entitle the second wife to take half the property.* From the evidence in this case, however, it would appear, that such permission never was given.

Q. 2. If the first wife did not make any written permission in favor of the second, will she be entitled to take half the estate on the death of her husband; he not having given her possession of the property while he lived?

And *a fortiori* without permission.

R. 2. Under these circumstances she will not, *a fortiori*, be entitled to take any of the property.

Q. 3. The first wife executed a deed of gift of her entire estate to a person whom she had adopted as her son, and who was then a minor. The name of her adopted son was, at her solicitation, registered as proprietor of some parts of the estate, but not of others, of which it is proved that, for the period of two years and a half after the date of the deed of gift, she continued in possession, and was ostensible proprietor. It was also proved, that she mortgaged it in her own name, notwithstanding that the parents of the minor, whom she had adopted, were alive. Under these circumstances will the validity of the gift be sufficiently established by her seizin in behalf of her minor adopted son, or will the gift of the estate be rendered null and void, in consequence of the donee's not having made entire seizin, or not having been registered as entire owner.

* Some little degree of casuistry appears in this doctrine, although it is no doubt conformable to Law. The reason assigned is, that the husband could not have disposed of the property, in any manner, unless the first wife had reconveyed it to him in the shape of a gift or otherwise, or unless she had appointed him her agent for the purpose of transfer, in which latter case, the transfer should have been made in the name of the principal, and not in that of the agent.

R. 3. The gift of those parts of the estate of which the minor was registered as proprietor, and of which he took *bonâ fide* possession, is undoubtedly valid; but there is a difference of opinion among lawyers concerning his right to those parts of which the donor continued in possession, as ostensible proprietor. By some, the doctrine is maintained that the seizin by the donor on behalf of a minor donee, who is living in his family, but with whom he has no relation, is not sufficient to establish the validity of a gift, if the father of the minor be alive and present; but that it is sufficient if he be not alive and present. Others contend that the seizin of the donor (not being related to the donee) is sufficient to perfect the gift made to a minor, and this is the opinion of modern lawyers, such as the authors of the *Jama-i-roomooz, Burjundee, Doorur-i Mokhtar, Ibrahimshahee, Qohistanee, Mooltaqit,* &c. who have declared, that decisions are conformable to the doctrine of the sufficiency of seizin, by a stranger in whose house the minor donee resides. Those lawyers who maintain the opposite opinion do not pretend that it is followed in practice. The mortgage by the donor, in her own name, was not legal. Her having done so cannot affect the right of the minor donee, nor in any shape invalidate the gift; for the mortgage cannot be considered as a proof of resumption on the part of the donee, because resumption of a gift is not lawful under such circumstances. Besides it must be in express terms, and not implied by the donors appropriating the profits or other similar acts, and it is no where laid down that resumption of a gift is of two descriptions, one express and the other implied.*

Seizin by a stranger on behalf of a minor donee, when sufficient.

* There was a difference of opinion among the Law Officers, in their exposition of the Law relative to the first and third questions. The Kazee ool Koozat (Nujmooddeen Ali Khan) was of opinion that the written permission, granted by the first wife in favor of the second, was sufficient to uphold the disposition made by the husband in her favor;

Q. 4. If the estate, which the donee transferred by gift to her adopted son, was held by her in joint proprietary right with her brother, will this circumstance affect the validity of the gift, as far as relates to her own property?

R. 4. The gift will be null and void by reason of its indefiniteness, the brother having a joint proprietary right.

Gift of joint property.

CASE XXII.

Q. 1. A person disposed of his property, consisting of a dwelling house, to another, but did not relinquish the possession. The donor and donee continued jointly seized of the property given. Under such circumstances is the gift valid according to Law?

R. 2. Such gift is not valid according to Law, because, in the case of a gift, it is a legal condition, that the donee should take complete possession, without the association of any other person, and that the donor should make complete delivery, and totally relinquish the possession of the property transferred, leaving it exclusively to the donee. But in the case stated, it appears, that the donor did not relinquish possession of the gift. On the contrary, the donor and donee remained in joint occupancy. It also appears, that the donor inhabited the house, until the time of his death, and indeed that he died in it. This fact has been clearly proved. In books of Law it is expressly stated, that if a person dispose by gift, of a house to another, and continue himself to inhabit it, or even keep some

The gift of a house is null and void if the donor subsequently occupy it or retain any part of his property therein.

and he was moreover of opinion that a mortgage having been granted by the donor, in her own name, of the lands formerly given, amounted to an implied resumption of the gift, and should operate as such. The legal opinion of the majority, however, as laid down in the above answers, was adhered to.

part of his property therein, the gift is void, from the circumstance of complete delivery and possession not having been established. Except in the instance of a wife, who may give a house to a husband, in which case the gift will be good, although she continue to occupy it along with her husband, and keep all her property therein; because the wife, and her property, are both in the legal possession of her husband. So also some lawyers have held, that if a father transfer his house to his minor son, himself continuing to occupy it, and to keep his property therein, the gift is valid; on the principle, that the father in retaining possession, is acting as agent for his son, according to which doctrine, his possession is equivalent to that of his son. But some lawyers object even to this principle.* It is clear, however, that with the exception of the two instances above-quoted, namely, that of the gift from the wife to the husband, and from the father to the minor son, any person disposing of his house to another by gift, must relinquish possession, to legalize the donation, and must so completely vacate it, as not to leave even a straw of his own property remaining therein, and must divest himself of all use and benefit therefrom, surrendering it totally to the donee. Under such circumstances only, can there be said to be a complete delivery and possession, and the gift consequently be held valid. In this case, the donor continued to inhabit the house given, subsequently to the gift, in the same manner as he had previously done, and lived in it to the hour of his death. The gift, therefore, is wholly and unquestionably null and void, and being so, the proprietary right in the house remained vested in the donor, until his death; after which event it should devolve on his legal heirs. Authorities: *Hidaya*,

Exceptions.

* See Prin: Gifts 8 and 9.

—"In case of gift seizin has been especially ordained; therefore complete possession is made a condition." *Shurhi Viqaya,*—"Gift is perfected by complete seizin, in such manner as the nature of the gift may admit of. Moveable and immoveable property have each their appropriate mode of seizin." The Commentator *Mirza Chulpee* has observed, that "the proof of right to a gift depends upon its being separated and delivered." *Kazee Khan,*—"A person gave a house to another, and delivered it to him, but there were the effects of the donor in it. This is not legal, because the thing given is employed to the use of something that was not given, and consequently this is not a delivery; that is to say, there is not established, on the part of the donor, a complete delivery, for the house may be delivered, and the use of it retained." Another example is given in the same authority,—"A person gave to another a house, in which was the property of the donor, or a bag in which was his food. In these cases the gift is not valid, because the things given are employed for the use of that which forms no part of the gift, which circumstance prevents complete delivery, although not preventive of delivery, in the ordinary acceptation of the term. The former however is the condition, and not the latter." *Foosool Imadeeya,*—"A gift with the retention of use is void. The use of the thing given for the benefit of the donor, prevents the completion of the gift, because seizin is a condition, that is to say, the donee must prove complete possession, which in this instance cannot be done; but as to possession, in the ordinary acceptation of the term, that may be established, though the use be retained." *Ashbah-o-Nuzayir.* In the first chapter of the book of gifts it is stated,—"A gift, with the retention of use, is void, except in a case where a father makes a gift to his minor son, as is laid down in the *Zukheera,* the author of which makes an exception in

Authorities for the necessity of the donor's entire relinquishment and the donee's exclusive possession.

favor of a minor son, receiving a present from his father." *Kazee Khan,*—"If a father make a gift of land to his minor son, and cultivate it subsequently, or make a gift of a house to him and continue to reside therein, the gift is void." In the *Moojurrud,* the following is stated as the opinion of Aboo Haneefa: "If a father make a present of a house to his minor son, and continue to reside, or keep his property therein, or permit others to dwell therein, without demanding rent, such gift is valid, and the father is acting for his son, but if rent be received by him, the gift is null and void." This is the latest doctrine of Aboo Haneefa, but it appears, that in the first instance, he did not make the case of a father and his minor son an exception to the general rule, declaratory of the invalidity of gift, with retention of use.*

Q. 2. Is a gift conveyed orally, without the execution of any deed, valid, or not?

Circumstances requisite to complete a gift.

R. 2. A gift orally conveyed is valid, because tender and acceptance are the only essentials to a gift, and complete seizin of the house, none of the donor's property being therein, and its not being used for his benefit, are the only conditions to perfecting the gift. A writing or deed is neither among the essentials nor conditions. Therefore in a case of gift, if oral tender and acceptance are established, and the condition of complete seizin be also found to exist, that is to say, that the thing given was in no manner employed for the benefit of the donor, and that it was not undefined, the

* The meaning is that, in treating generally of the doctrine concerning the validity of gifts, which requires the possession of the donor to cease entirely and that of the donee to accrue exclusively, Aboo Haneefa did not make any special exception in favour of a gift made by a father to his son; but that in treating of this particular case he has declared that a father may retain possession, as *agent* for his son, of property bestowed by himself, during the minority of such son.

gift is valid, although no deed may have been executed; but, from the proceedings in this case, it has been proved, that the house given was inhabited by the donor until his death, and the use of the thing given, for the benefit of the donor, renders the gift null and void in Law. Another cause to render the gift null and void in this case is, that it has been proved, that the house was given both to the grand-daughter of the donor and to her husband, and it is laid down in the *Hidaya* and other Law Books, that a gift by one person of a house to two persons is invalid, because the gift is undefined, the house having been given to two persons jointly and no division of their respective shares having been made; and an undefined gift is by Law invalid. The gift therefore is null for two reasons: the one its being used for the benefit of the donor by his inhabiting it; the other, the undefined nature of the gift. It is alike, whether there be a writing or not. The gift will be invalid, if there are grounds of invalidity, although a deed may have been executed, and it will be valid, if there are grounds of validity, although a deed may not have been executed. In this case, the absence of a deed is not the cause of the invalidity, but the causes are, that the house was used for the benefit of the donor, and that the gift was undefined. Authorities: *Hidaya,*—"Tender and acceptance are necessary, because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts; and seizin is necessary, in order to establish a right of property in the gift." In the same authority it is laid down, "If two persons jointly make a gift of a house to one man, it is valid; because as they deliver it to him wholly, and he receives it wholly, no mixture of property can be said to exist at the time of seizin." If one man make a gift of a house to two men, the gift is invalid, according to Aboo Haneefa. The two disciples

Gift of a house by one to two persons.

Authority for the essentials of gift.

Gift of a house by two persons to one.

hold it to be valid, as the donor gives the *whole* of the house to each of the two donees (in as much as there is only one conveyance); there is consequently no mixture of property, in the same manner as where one man pawns a house to two men. The arguments of Haneefa upon the point are two fold. First,—The gift, in this case, is a gift of *half* the house to each of the donees (as is evident from this, that if one man give to two men something incapable of division, and one of them accept the same, the gift becomes valid, with respect to his share); and such being the case, it follows that at the time of seizin by each of the donees, a mixture of property must take place. Secondly,—As a right of property is established in each of the donees, in the extent of one-half, it follows, that the conveyance or investiture must also be in the same proportions, since the right of property is an effect of the conveyance: on this condition therefore, that a right of property is established in each with respect to one-half, an undefined mixture of their respective shares in the gift is fully established. It is otherwise in a case of pledge, because the effect of that is *detention*, not right of property, and the right of detention is wholly and completely established in each of the pawn-holders, insomuch, that if the pawner should discharge the debt of one of them, still the right of the other to a complete detention remains unimpaired." It is laid down also in the same authority, that "a gift of part of a thing, which is capable of division, is not valid, unless the given property be divided off and separated." The meaning of "divided off" is that it should be disconnected with the property of the donor, and the right to it not exercised by him. The meaning of the Law is, that it should not be employed for the benefit of the donor. For example: a person gives a house to another, but keeps his effects therein, or inhabits the house, the gift

Pledge of a house by one to two persons.

Authorities.

is void, because, in the first instance, the house is employed for the benefit of the property of the donor, consisting of his effects; and in the second instance, although not employed for the benefit of his property, it is employed to afford him the benefit of a residence.

Q. 3. Is a gift valid, made by a person to the husband of a grand-daughter, notwithstanding that, at the time, he has a daughter, and three other grand-daughters living?

R. 3. A gift made under the circumstances stated in the third question is legally valid, because a person is at liberty to give away his own property as it suits his inclination. If he pleases he may give it all to one of his children, or to strangers, or to beggars. No one of his children or descendants have a right to oppose his inclination, for the right of the heirs to the property does not accrue until after his death, and not during his life-time. If, therefore, notwithstanding he have one daughter and four grand-daughters, he dispose of all his property by gift to the husband of one of the grand-daughters, the gift is undoubtedly valid. But, in this case, a great discrepancy is apparent, between the claim of the gift and the evidence of the witnesses, and it is laid down in the *Hidaya*, that where there is any difference between the claim and the evidence, the latter must be rejected. The difference is, that the claim, as set forth in the reply, contends that the gift was made to the defendant and her husband jointly. Now, according to this claim, a gift is presumed to have been made by one person to two, which, from its indefinite nature, is illegal, and it signifies nothing therefore, whether such gift is or is not established by the evidence of witnesses, as was before stated. But in the claim, as set forth in the rejoinder, it is contended that

Of the father's power over his property.

Contradictory pleadings in different sta-

ges of a proceeding are fatal to a claim.

the gift was made to the defendant alone; and from the evidence adduced in support of the reply, it appears that the gift was made to the husband of the defendant solely. These three assertions therefore are at variance with each other. The first contending that the defendant and her husband are both the donees; the second contending that the defendant is the sole donee; and the third, that the husband of the defendant is the sole donee. To suppose that a gift made to either a husband or his wife is, from their union, in the same predicament as a gift made to both of them, is a vulgar error, and has no foundation in Law. Therefore the evidence of the witnesses, which is neither conformable to the claim set forth in the reply, nor to the claim set forth in the rejoinder, is inadmissible in Law and nugatory. (Here follows a summing up of the discrepancies observable in the testimony of the several witnesses.) Their testimony, therefore, being at variance with the pleadings, which invalidates it, the gift is not established thereby. It has been shewn also, that independently of this circumstance, the gift is invalid *per se*, from the continued residence of the donor in the house, and the consequent incomplete possession. Therefore it signifies nothing whether such gift be proved or disproved. As the house did not go out of the property of the donor until the day of her death, it will, after that event, devolve on her heirs. Authority: *Hidaya*,—"Where the evidence adduced by a claimant is conformable to the claim, it is worthy of credit, but not where it is repugnant to it; because, in matters concerning the right of the individual, the priority of the claim is requisite to the admission of evidence, and this exists in the former instance but not in the latter.*

The interests of a husband and wife are distinct.

Of evidence at variance with a claim.

Authority.

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* The meaning is that the nature of the claim must be asserted before evidence is adduced in support of it, and not afterwards. The evidence must uphold the claim, and not the claim the evidence.

CASE XXIII.

Q. 1. If the gift made by Musst. Sajidoonisa in favour of Fukhur-oodeen Hoosein to the extent of her own share (being one-fourth of the property left by her father,) be declared null and void, by reason of the property being undivided, or on any other ground of invalidity, and it be admitted, on the part of the donee, that, from the time of the donor's death, he himself and his guardian had possession of the property so given, is it legally incumbent on the donee to account to the donor's heirs for the profits which accrued from the estate, during his own and his guardian's possession?

Of mesne profits in case of an invalid gift.

R. 1. The mesne profits accruing from the estate in this instance (analogously to the Law by which invalid sales are governed) are not considered definite property, or identical with the estate itself and, according to the opinion of Aboo Haneefa, Fukhur-oodeen Hoosein is not accountable to the heirs of Sajidoonisa for such profits. The two disciples maintain the contrary, but the opinion of Haneefa is best received and most acted upon.*

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* There is considerable obscurity in this doctrine. A quotation from the *Hiduya* may perhaps render it more intelligible,—"It is to be observed that if a person claim a debt from another of a thousand *dirms*, and obtain payment of the same, and both parties afterwards agree that the debt was not due, in that case the profit which the claimant may in the mean time have acquired by possession of the money is lawful to him; because the *baseness*, in this instance, is occasioned by *invalidity* of right; for this reason, that the debt had been owing in consequence of the demand of the claimant, and the defendant's acknowledgment of it; and it afterwards appears that this debt is *not* the right of the *claimant*, but of the *other*, (namely, the *defendant*:) still, however, the thousand *dirms* which the claimant took in satisfaction for his demand have become his property, as the satisfaction for a claim becomes the property of the claimant, although it be under an invalid right;—and as the baseness, in this instance, is occasioned by the mere *invalidity* of right of property, and not by the absolute *non-existence* of that right, it consequently cannot operate, nor have any effect with respect to a thing of an *indefinite* nature, such as *money*, for instance."—*Hidaya*, vol. 2, page 460.

Q. 2. The rents due from certain tenants of one of the villages of the estate are declared receivable by the donee, but the rents of that village were taken collectively by all the sharers. The lands belonging to those tenants were not parcelled off, nor their boundaries defined, nor was there any specification of the village in the deed of gift, which merely mentioned the ancestrel estate generally. Under these circumstances, will one-fourth of the village in question legally belong to the donee in virtue of such deed of gift?

Gift of land is not perfected by assignment of rents.

R. 2. By the mere specification of certain of the tenants of one of the villages, without a separation of the lands which they occupy, and a definement of boundaries, and without making any division, the gift of no part of the village is good; but if there was a regular separation of such lands from the remainder of the estate, by means of measurement; and the quantity occupied by the tenants defined, the land so divided off must be considered an independent portion of the estate, and not being indefinite, the gift of such fourth part of the village must, on the donee's making seizin, be held to be complete and binding.

CHAPTER V.

PRECEDENTS OF WILLS.

CASE I.

Q. A person sues for possession of a certain estate, founding his claim to proprietary right on the plea, that the deceased owner, in her life-time, assigned over to and gave to him (the plaintiff) possession of her entire property, real and personal, with all the rights and profits appertaining thereto, with the exception of the estate now sued for, which was excepted by reason of its being then under litigation; and that she moreover made a nuncupative will* in his favor, formally and publicly nominating him her executor with power to realize all outstanding balances of every description which might be due to her, and to adjust all claims that might be made against her estate. Under these circumstances, has the claimant, in virtue of the assignment and will above recited, a legal right to such property as may not have been in the possession of the deceased owner during her life-time? and what difference does the law make between a gift and a *Tumleek* or assignment of proprietary right? and also what authorities can be cited in favor of the validity of the assignment and will above specified.

Definition of a will.

R. A will signifies an assignment of property to take effect after death, or as if one should say to another "give such an article to such a person after my decease." The thing so given is called a legacy, the person giving the testator, the person to whom it is given the legatee, and the person to whom the trust of giving

* A nuncupative will, agreeably to the provisions of the Moohummudan Law, is of equal validity to a written one. See Prin: Wills 1.

is confided is called the executor. It is essential to the validity of a will that the property willed away should exist in the possession of the testator at the time of his death,* otherwise the legacy will have no effect. For instance, if a person leave by will one-third of his flock of sheep to another, and it appear that, at the time of his death, he had no animal of this description, the legacy will be void, on the principle of its being necessary that the property should exist in the possession of the testator at the time of his death.

Of a legacy, the testator not being in possession thereof at his death.

The term *Tumleek* is one of general import and may be applied to a gift, whether unconditional or conditional, to a sale, or to a will. But the term *Hibba* (gift) signifies the immediate transfer of property to another without a consideration. Thus the difference between an assignment of proprietary right and gift is, that the one is general and the other particular. Legally speaking, therefore, the plaintiff, whether in virtue of a will or a gift, has no right to property of which the deceased owner was not in possession.†

Tumleek and *Hibba.*

CASE II.

Q. A woman died, leaving some moveable property, which, on her decease, was placed under the Seal of the Court, in consequence of her appearing to have not left any heirs. A proclamation for the appearance of

* But it is not necessary that the subject of the legacy should exist at the time of the execution of the will. See Prin: Wills 8.

† From the above exposition of the Law it would appear, that there is but little difference in the provisions regarding gifts and those regarding legacies. With respect to legacies, the entire relinquishment of the donor must take place physically, and the exigency of the law is consequently so far fulfilled. But acceptance on the part of a donee is essential to the validity of gift; and a legacy is of course voidable at the pleasure of a legatee. The chief distinctions seem to be, that a legacy may be made, the subject of which is not in the possession of the testator at the time of the execution of his will, whereas a gift, under such circumstances is null and void, and that a testator, in willing away property to several individuals, is not bound to separate and define the portions of each.

claimants having been issued, a woman came forward and stated that she was the daughter of the deceased, that the deceased had disposed of her in marriage, and that she was the lawful heir to all her property. The claimant moreover adduced four witnesses, who deposed on oath, that the deceased had, on several occasions, in their presence, declared that she had adopted the claimant, that she had disposed of her in marriage, and that the claimant was her lawful heir. Under these circumstances, is the claimant entitled to succeed to the property of the deceased woman, or should it be considered as an escheat to the Public Treasury?

A person declared by a proprietor to be his sole heir, takes as sole legatee.

R. It appears, from the question, that the deceased woman declared the claimant to be her heir in the presence of four witnesses. The obvious intent and meaning of this declaration is, that the claimant should succeed to her property after her death. It is impossible to put any other construction on these words, than that they imply a legacy of the entire property, and, though this is not expressed in the letter, yet regard should be had to the meaning of the declaration.*

CASE III.

Q. Is it legal for a man to leave his property by will to four persons, being strangers? and, supposing any of the provisions contained in the will to be contrary to Law, will this circumstance invalidate the will *in toto*, or only so far as affects such illegal provision? If the illegal provision render the whole will illegal, will it acquire validity by having been acted upon and

* Where there are no heirs nor creditors, the Law allows of the entire estate being bequeathed by will, and it is not necessary (as it is in the case of gift) that the legacy should be express. On the same principle that a legacy may be retracted, (see Prin: Wills 11), it may be conferred, by implication.

acquiesced in, for the space of two or three years after the death of the testator?

Of a will containing an illegal provision.

R. According to Law, the granting of legacies to the extent of one-third of the estate is admissible. The remaining two-thirds go to the heirs, who are, in this case, two widows and a sister, the former of whom will take a fourth, and the sister will take the remainder. If therefore any one should adduce a legal claim, the whole of the provisions of the will cannot stand. Property exceeding in amount one-third of the estate, cannot be taken by persons not being heirs. A part, therefore, of the will is contrary, and a part agreeable, to the Law; but the part which is illegal does not invalidate the whole. Those persons who, after the death of the testator, acquiesced in the will and permitted its provisions to be carried into effect, cannot retract without having recourse to Law.*

CASE IV.

Q. A Moosulmaun during his life-time made a will, leaving his entire property to the son of his brother, notwithstanding the fact of his having then a wife living. The will was attested by the wife. Shortly afterwards he died childless, and after his death, his nephew aforesaid and his widow continued in joint possession of his property. On the widow's death her brother claimed her share of the property. Under these circumstances, is the will made by the deceased in favour of his nephew (such nephew being one of his legal heirs) a valid instrument, and sufficient to defeat the rights of the widow's heirs?

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* The principal point of Law in this case is, that the general validity of a will is not affected by its containing illegal provisions. See Prin: Wills 9.

R. If the widow after the death of the husband consented to the will executed by him, it must be considered in all respects good and valid; because legacies in favour of an heir are void, only in case the other heirs do not consent,* and in this case, although the consent does not appear to have been express, yet it was clearly and unequivocally implied.

A bequest to one heir is valid with the consent (express or implied) of the rest.

CASE V.

Q. 1. There were two brothers, one of whom died, leaving three sons and a daughter. The surviving brother subsequently made a will in favour of his nephews and niece (children of his deceased brother), making all the real and personal property, ancestrel and acquired, whether belonging to himself or to his brother, into seven shares, and assigning two shares to each of his nephews, and one share to his niece. He did not, however, during his life-time, parcel off their respective portions of the property, and put them into possession, but merely empowered them to realize the profits of the property, agreeably to the shares which he had assigned them respectively. Under these circumstances, is the will executed by the surviving brother available in Law?

R. 1. The will is valid, because the testator is master of his own property, and has a right to make a legacy in favour of any one whom he chooses. As far therefore as regards his own property, whether real or personal, ancestrel or acquired, his legacy of it to his nephews and niece is allowable, but, as far as regards the property which appertained to his brother, the disposition made by him is perfectly useless and nugatory; because his nephews and niece have an absolute legal right to inherit their father's estate, in the proportion

Of legacies, part of which did not belong to the testator, and in favor of persons some of whom were heirs.

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* See Prin: Wills 3.

of a double share to the male. The intention of a legacy is to create the right to property; but the legacy in this instance was superfluous, in as much as the legatees became entitled to the property of their father on his death, in virtue of their right of inheritance. The disposition by will, however, made by the surviving brother of his own property, is by no means invalidated by the circumstance of his not having parcelled off the respective portions, and put the legatees into possession during his life-time, for indefiniteness in case of a legacy is allowable. His allowing them to realize the profits of the shares assigned to them respectively was merely an act of permission; in other words it amounted to a permission to others to make use of his property, and this is allowable; for, in an act of permission, indefiniteness is no objection, as it is in the case of an absolute gift. The will which he executed is suspended on the condition of his death, and, therefore, after that event, his niece is entitled to one-seventh part of his property, she not being one of his heirs. And, after she has realized her seventh share, to which she is entitled by the legacy, the brother's sons are entitled to share the remainder equally among each other in virtue of their right of inheritance; because they are both heirs and residuaries, and legacies cannot be left to heirs. The authorities for the above opinion are as follow: in the *Hidaya*,—"A will containing legacies which the testator was competent to bequeath and which he was not competent to bequeath, is valid for the former and not for the latter." So also in the same authority,—"If a person bequeath a third of his property to one man, and a third to another, and the heirs refuse their consent to the execution of both bequests, one-third is in that case divided equally between the two legatees; for where the will exceeds a third of the estate, and the heirs refuse their consent to the execution of the whole,

Distinction between gift of property and permission to exercise proprietary right.

Wherein consisting.

Authorities regarding the doctrine of wills and legacies.

it is then restricted to one-third, as has been already explained; and as, in the present instance, the right of both claimants is equally good, and the third is capable of division, it is therefore divided equally between them." So also in the *Shurhi Viqaya,*—" Proprietary right may be established, as well by granting a permission to exercise proprietary right, as by making an absolute gift; for instance, if the proprietor of a vessel of water should say to a party of people who had performed purification by *Tyummum,* that any one of them might use the water for the purpose of ablution; and there was a sufficiency of water for any one of them singly to have washed in, the purification which they performed by *Tyummum* becomes of no avail; for when one of the party purified himself by ablution with water, the rest must again have recourse to the purification by *Tyummum,* because the right of ablution was established in each individual severally. But if the proprietor of the water had said to them,—This water is your property collectively, and they took possession of it as such, their previous purification by *Tyummum* is not rendered unavailable, because (according to the doctrine of the two disciples) in the case of an undefined gift, the proprietary right is vested in all the donees collectively, and each individual did not possess a sufficient quantity of water to enable him to perform the ceremony of ablution. But the more approved reason for this doctrine, according to *Aboo Haneefa,* is, that the water continued to be the property of the donor and that option was not established; for that where a gift is null, an option which is comprehended therein must necessarily be null also. Therefore if the whole party were to confer an option on one individual donee to use the water, and he failed to do so, the former purification by *Tyummum* of that individual is rendered unavailable, according to the doctrine of the two dis-

Authorities for the above distinction.

ciples, but not according to that of *Aboo Haneefa,* because, when they themselves had not the proprietary right, they had no authority to confer the option." The inference to be drawn from the above quotation is, that there is a distinction between conferring an option and making an absolute gift; seizin being necessary in the latter case but not in the former, and that indefiniteness invalidates a gift but not an option. This distinction is obviously inferrible. The following is an extract from the *Hidaya:* "If a man make a bequest in favour of a part of his heirs, it is not valid. It is to be observed, that in judging whether the legatee be an heir, or otherwise, regard is paid to the time of the testator's death, not to the period of making the will; because the efficacy of the will is established after the death of the testator." In the *Kifaya,* a commentary on the *Hidaya,* treating of the above passage, it is stated,—"If a person, having a son, left a legacy to his brother, and the son died during the life-time of his father, the legacy is null."*

Of a legatee becoming an heir before the testator's death.

Q. 2. Supposing the words "*household effects*" not to have been inserted in the will, should this description of property be comprehended in the disposition of the estate, although not particularly specified?

Of a will containing words of general import.

R. 2. The household effects should be comprehended, because the terms used in the will are possessions and lands, in the former of which household effects are included; in the same manner as the term "lands" includes gardens, roads, &c. although those may not have been specifically mentioned. But the provisions of the will do not apply to all the children of the testator's brother.

* But a person being an heir at the time of the execution of the will, and becoming excluded from the inheritance previously to the testator's death, can take the legacy left to him by such will. See Prin: Wills 10.

The daughter of the testator's brother will take a seventh share of the whole property, including household effects and every other description of property, agreeably to the provisions of the will. Afterwards, what remains the sons of the testator's brother will share among themselves equally, by reason of their right of inheritance as paternal kindred, for the daughter of the brother is not an heir, whereas the sons are heirs. The above is the true exposition of the Law in this case. Authorities: It is laid down in the *Tulweeh* and other Law Tracts,—"A general term comprehends all particulars, and this rule should be applied to all words of a general import;" for instance: "whatever I possess, and the things I possess," comprehend every species of property possessed by the declarer; and so must the will be construed, agreeably to the passages in the *Kifaya* and *Hidaya* above-quoted.*

Authority

* The meaning of the illustration relative to the doctrine of *Tiyummum* requires, perhaps, to be explained. The Canonical Law of Moohummud enjoins the use of sand or earth, where water is not procurable, for the purpose of purification; and it also enjoins that, as soon after as may be practicable, ablution be performed, and if an opportunity of performing this be neglected, the previous purification by *Tiyummum* becomes useless. Now in the case first put, as each of the persons who had performed *Tiyummum* had severally an opportunity of ablution, which, by the permission of the proprietor, each was at liberty to use, their previous purification by *Tiyummum* was rendered of no avail, there having been a sufficiency of water for any one of them to have used; but in the case secondly put, the gift not defining the respective shares of each, was null; and even admitting it to hold good, no one of the donees was competent to use it; the gift having vested in them all collectively, and there not having been a sufficiency of water for the use of the whole of them.

CHAPTER VI.

PRECEDENTS OF MARRIAGE, DOWER, DIVORCE AND PARENTAGE.

CASE I.

Q. 1. A woman, for a pecuniary consideration, executes a written agreement, that she will marry her daughter (aged only three months at the time of the agreement) to the son of another woman, and takes the son into her house accordingly, and educates him. Afterwards, the mother of the daughter departs from her agreement, and refuses to permit the ratification of the contract. Under these circumstances, has the mother of the son a legal right to compel the mother of the daughter to fulfil the contract; or can she recover from her the money given in consideration of the agreement of matrimony?

Promise of marriage cannot be legally enforced.

R. 1. The mother of the son has only a legal right to the money paid by her in consideration of the marriage, and she will recover the whole amount so paid. According to the doctrine contained in the *Futawa Kazee Khan*,—"A person solicited the daughter of another in marriage and sent her presents. The father of the daughter afterwards refused to fulfil the marriage contract. In this case it has been ruled, that whatever was sent as dower, or in consideration of the marriage, whether forthcoming or not, must be restored, and that whatever was sent as a present must be restored if forthcoming, but that, if lost or destroyed, it is not claimable as a debt."

Q. 2. A woman solicits the daughter of another in marriage for a boy educated under her care, and gives, or sends to the house of the girl's parents, jewels,

ornaments, clothes and the like. In such case, is the marriage contract complete and binding; and if not, is she legally entitled to recover the property which he had given?

R. 2. In such case the contract of marriage is not binding and complete, because declaration and consent by the parties are requisite to give the contract validity. Under the circumstances stated, the required declaration and consent do not appear to have taken place. But whatever was given to the parents of the girl solicited in marriage, or sent to their house in consideration of marriage, is legally recoverable. According to the *Mokhtusur Ooshafee* cited in the *Futawa Masoomee,*—"A man sent to the father of a girl whom he had solicited in marriage, gold, silver, clothes, or other property, or made him a present of some articles and repeated his presents (as is customary in modern times). A contract of marriage is not thereby executed, because marriage is legally contracted only by declaration and consent, which do not appear here to have existed." So likewise in the *Dustoor-ool Koozaut.* A passage in the *Futawa Kazee Khan* is to the following effect: "A person solicited the daughter of another in marriage, and sent her presents, &c. (above cited).

Any thing given in consideration must be restored.

If gratuitously given must be restored if forthcoming.

CASE II.

Q. Is it customary on occasions of mariage to enter into any written agreement; for instance, a man betroths his son to the daughter of a dancing woman, and that woman, having paid a certain sum of money, takes a written engagement from the father of the intended bridegroom, specifying that he had received the money and agreeing to the marriage of her daughter with his son, for such pecuniary consideration. If the person engaging should, notwithstanding this written obliga-

tion, and the fact of his having kept his intended daughter-in-law in his house, omit to perform the promise therein contained, can such obligation be considered equally binding as in a case of regular sale? and would the Law recognize it as worthy of being enforced?

A written engagement to marry is not binding, but any sum paid in consideration is recoverable.

R. Among the respectable part of the community written engagements are never entered into on such occasions. It may be customary among the inferior classes, but if any one; for a pecuniary consideration, should execute an obligation of the nature described in the question, it merely amounts to a promise of giving in marriage, and by no means amounts to an actual contract of marriage; and the person executing such obligation is at liberty to depart from the terms of it, and to procure the marriage of his son with any person whom he may think fit, but, if demanded, he must refund the pecuniary consideration received. The conditions of a contract of sale are defined and specific, but no one of those conditions is found to exist in a contract of the nature here alluded to.*

CASE III.

Q. A man causes a contract of matrimony to be entered into between his son and his niece, without the consent of her mother, and at a time when they were both only three years of age. But the son and the niece, during their childhood, imbibed the milk of the

* In this case the contract may be said to have been a *Hibba-ba Shurt-ool Iwuz* or gift on stipulation, which, in its effect only, resembles a sale, and until the consideration be received, the property parted with on one side may be held to be of the nature of a pure gift, which admits of resumption when forthcoming; or it may be held to be property parted with for a valuable consideration, of which, if itself not forthcoming, the price must be restored. In one of the cases propounded in the preceding question, of the gifts having been made simply as presents, without reference to any consideration, they would be resumable if forthcoming only, under the general Law of revocation of gifts.

same woman. Under these circumstances is the marriage conformable to Law?

R. It merely appears from the question, that the son and niece, at the same period, during their childhood, imbibed the milk of the same nurse, but their respective ages at the time are not specified. The Law makes a distinction as to the validity or invalidity of a marriage between parties who have imbibed the same milk, depending upon their respective ages at the time they did so. If the parties imbibed the milk of the same woman, on or before their attaining the age of thirty months or two years and a half, their subsequent intermarriage will be illegal; but, if at a time subsequently to their attaining that age, it will be legal. So also if the age of one of the parties may have exceeded, and that of the other fallen short of, the prescribed age at the time of their being suckled by the same woman, the circumstance will be no impediment to their marriage.*

Marriage how voidable by fosterage.

CASE IV.

Q. A person, with a view to avoid the disgrace of having fornication imputed to him, marries a pregnant woman before her delivery; but the woman continues to remain in the house of her parents. She now comes forward and claims from her husband arrears of alimony for six years. The witnesses brought forward depose to the marriage having been celebrated sixteen or seventeen years ago, and it is also proved that the wife never lived with the husband, nor received maintenance from him. Under these circumstances, is such marriage

* It is a general rule that any marriage which is prohibited by reason of consanguinity, would equally be prohibited by reason of fosterage, but there are two exceptions to this rule, for which see Prin: Marriage, &c. 23.

valid? and has the wife a legal title to any arrears of alimony, claimed at a period of sixteen or seventeen years subsequent to the celebration of the marriage?

Of marriage with a pregnant woman and of cohabitation.

R. By Law, marriage with a pregnant woman is permitted, but cohabitation is prohibited until after delivery, if the pregnancy was by any other than the husband. According to the *Hidaya*,—"A man may lawfully marry a woman pregnant by whoredom; but he must not cohabit with her until after her delivery." Arrears of alimony are not claimable from a husband, unless by stipulation or by a judicial decree. According to the *Viqaya*,—"Maintenance for a past period is not due, unless awarded by order of the Kazee, or stipulated between the parties, in which case the payment becomes obligatory."

CASE V.

Q. A woman, on the occasion of her marriage, received, as a gift from her mother, eighty beegahs of land, a dwelling house and a cow house. She afterwards died, leaving a husband, an unmarried daughter and a son. Now to what proportions of the above-specified property will her husband and her two children be entitled on her death?

The wife's property does not vest in the husband by marriage.

R. According to Law, a woman is absolute proprietor of all property, real or personal, whether acquired by her on the occasion of her marriage or otherwise, and therefore, when she dies, it will be distributed, according to the Law of Inheritance, into four equal shares, of which her husband will take one, her son two and her daughter one share.*

* The Moohummudan doctrine in this, as in most other points, more nearly resembles the Civil than the English Law. One of the most familiar instances of confusion taking place according to the English Law, is the marriage of the debtor and creditor, by which, as a general

CASE VI.

Q. Is a married woman competent to dispose of her jewels, wearing apparel and other effects, by gift to a stranger, or does the Law require that she should previously obtain the permission of her husband?

A married woman has unlimited power over her own property.

R. A married woman is competent to dispose of her own effects by gift, whether they consist of jewels or other articles. The Law does not require the permission of the husband.*

CASE VII.

Q. 1. A Moosulmaun, after having a son and daughter by his first wife, marries a European woman, having converted her to his own faith. Is such second marriage good according to Law?

Of the religion and number of wives.

R. 1. Such marriage is good, because the woman was converted to the Moosulmaun religion, which permits of four wives.† A man may have four wives at the same time.‡

Q. 2. The claim of the first wife, on account of dower, having been satisfied by the husband, and she having given an acquittance for the same, they mutually dissolve the marriage. The husband, notwithstanding that his son and daughter by his first wife are alive, disposes of all his property, real and personal, by gift,

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rule, the respective rights and obligations become mutually extinct, and do not survive upon the death of either of the parties. The Civil Law admitting a separation of property between husband and wife, the same consequence did not ensue. *Evans on Pothier, Number XIV. of Confusion or Extinguishment.*

* See Note to preceding Case.

† See Prin: Marriage, &c. 8.

‡ Whether the woman was converted or unconverted is a matter of no consequence as far as regards the legality of the marriage. See Prin: Marriage, &c. 12.

in lieu of dower, to his second wife, without the knowledge of his children. Is such gift valid according to Law?

A gift of all the property to a second wife is good though there are children by a former marriage.

R. 2. Under such circumstances, the first marriage being dissolved, the husband is competent to make a gift of the nature described in the question, and the gift will be complete on the second wife's taking possession, because the husband has absolute authority over his own property. His son and daughter would inherit after his death, but not during his life-time.*

CASE VIII.

Q. A person, previously to contracting a marriage, makes a verbal agreement with his wife, conditioning that, after marriage, she shall be at liberty to live in the house of her parents. After the consummation, is he competent to infringe this agreement by removing her to any other place, or is it incumbent on him implicitly to fulfil its condition?

Of marriage with an illegal condition.

R. According to the Moohummudan Law such an agreement is illegal, and therefore it is not incumbent on the husband to abide by it, and he has full power to carry his wife to his own house, provided he shall have paid the amount of her dower; but, in the event of his not having done so, she is at liberty to object until the amount is paid.†

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* In this case it should be remarked, that the fact of the first wife's dower having been satisfied, is expressly stated; otherwise her children would have had a lieu on her husband's property to the extent of the dower due to her.

† It is a general principle in the Moohummudan Law that any illegal conditions annexed to a contract, may be infringed without affecting the validity of the contract itself. They are considered void *ab initio*, or rather as if they had never been made at all. See this rule recognized in Prin: Sales 16, and Prin: Wills 9 and Prin: Claims 3.

CASE IX.

Q. A person, for some pecuniary consideration, executes a written agreement, that he will marry his daughter to the son of another woman. The mother of the son receives the girl into her family, and her son dies before the marriage was legally solemnized. Under these circumstances, has the father of the daughter the right of disposing of her in marriage to another person, or the mother of the deceased?

Right of a girl betrothed, on the death of her intended husband.

R. According to Law, the mother of the deceased person, with whom the marriage of the girl was intended, but not solemnized, is not entitled to dispose of her in marriage. The father of the daughter is at liberty to give her in marriage to some suitable person, and if she be discreet and adult, she is in every respect authorized to enter into a marriage with a person of equal condition, as is admitted by all authorities.

CASE X.

Q. If A, having married B, should afterwards marry her uterine sister C, during the life-time of B, and if such second marriage should be invalid according to Law, will the first marriage nevertheless hold good and will B be entitled to dower?

Of marriage with a wife's sister, the first wife being alive at the time.

R. The marriage of A with B will stand good, notwithstanding the fact of his having subsequently married her uterine sister C. As C however, by reason of her affinity, falls within the prohibited degrees of relation, her marriage with A is null and void, and she is not entitled to dower; but this fact does not invalidate the prior contract with B, and, on the death of A, his

wife B will be entitled to the full amount of her dower out of his estate.*

CASE XI.

Q. 1. What words and what forms are necessary to constitute a marriage?

Ceremonies requisite to marriage.

R. 1. To constitute a marriage, words of proposal and acceptance are absolutely necessary on the part of the contracting parties; for instance the husband himself says,—"I have married such a woman on such a dower," and the wife says,—"I have agreed," or the agent of the wife may say,—"I have given such a woman in marriage to such a man for so much dower," and the agent of the man may say,—"I have consented on behalf of such a person." It is likewise a condition,† that two men, free, sane, adult and Moosulmauns,‡ should be present at the place of the contract, in order to witness the proposal and acceptance, or one man and two women of the above description. The feasting, entertainments and other preparatory ceremonies are merely customary forms, which are by no means essential to the contract.

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* Had the two sisters beeen married by the same man at the same time, or had the priority of one or the other marriage not been ascertainable, they would both have been invalid. This supposes the former wife to be alive and the marriage not to have been dissolved. There is no objection in the Moohummudan Law to a man's marrying the sister of his deceased or divorced wife. The above doctrine is contained in the *Moheet-oo-surukhsee* cited in the *F awa-i-Aulumgeeree*.

† This doctrine would at first sight appear inconsistent with that laid down in the case of Mirza Jaun and others (vide Precedents of Marriage, Note to Case XLVII.); but in reality they are perfectly reconcileable. The doctrine in that case was that hearsay evidence is sufficient to prove a marriage; but then it is presumed that the marriage was legally performed in the presence of witnesses, as required by the doctrine in this case. The answer to the second question tends also to establish this point.

‡ Objections as to character and relation do not apply to witnesses in a contract of marriage, as they do in other contracts. Prin: Marriage, &c. 5.

Q. 2. What description of evidence is necessary to establish a marriage?

R. 2. Witnesses should have ocular proof in all instances, except in cases of parentage, marriage, and certain other special cases, in which hearsay testimony is allowable,* provided that the witness has a thorough belief of the fact, either from its notoriety, or from information communicated by another, whose veracity he has no reason to suspect. This is according to the *Hidaya.*

Hearsay evidence when admissible.

Q. 3. Can a Moosulmaun lawfully enter into the state of matrimony with his slave girl?

R. 3. The marriage of a Moosulmaun with his slave is useless and inoperative, because the legality of enjoyment is as much secured by the right of property, as it could be by a contract of marriage; but the practice has nevertheless been recognized as proper in modern times, on a principle of caution and moral dread; because it is universally admitted, that she only is, strictly speaking, a slave who has been captured in an infidel country, or who is a descendant from such captive; but as to slave girls, in the popular acceptation of the term, such as those purchased in times of famine and scarcity by Moosulmauns and others, the legality of enjoying them is denied. It is, therefore, preferable to contract matrimony with such persons, for the purpose of legalizing the enjoyment of them.

Legal definition of slavery.

Q. 4. A Moosulmaun marries his four slave girls, and afterwards, during the life-time of all four of them, enters into matrimony with a free woman. Is such fifth marriage legal and valid?

* See Prin: Claims, &c. 14.

Of marriage with slaves.

R. 4. If it be established that a Moosulmaun did marry four women, who are, strictly speaking, his slaves, his marriage with them is null and void, and his subsequent marriage with a free woman is not in reality a fifth marriage, and it is a good marriage, during the life-time of the slaves; but if the four women are not strictly and legally his slaves, but merely pass as such according to the popular acceptation of the term, marriage with them is permitted by law, and a subsequent marriage with a fifth woman, is a fifth marriage, and consequently invalid;* but dower is due after the consummation of an invalid marriage, and in such case, of the proper dower and the stipulated dower, that which amounts to the smaller sum must be paid by the husband. So also the parentage of the offspring of an invalid marriage is established in the husband.

Of dower and parentage in an invalid marriage.

CASE XII.

Q. An adult woman entered into a contract of marriage with an individual, by her own free will and consent, in the presence of witnesses; afterwards, her relations having forcibly carried her away from the house of her husband, disposed of her in marriage to another individual. Both the husbands now sue for possession of the woman. Each party has witnesses to prove, the one, that the marriage was duly solemnized on the fifth, and the other that the marriage was celebrated on the eighth of the month of *Ramzaun* of the same year, with them respectively. The second claimant contends that he married the woman after her divorce. The woman and her relations wish to uphold the second marriage. Under these circumstances, to which of the two claimants does the woman lawfully belong, and is

* But, had the person alluded to in the question, married only one female slave, the property of another individual, he could not subsequently have married a free woman. See Prin: Marriage, &c. 11.

it essentially necessary, to establish the fact of a marriage, that the person by whom the ceremony was performed should give evidence as to the fact of its solemnization? and is it requisite to the validity of a marriage that the woman and her guardians should approve of it?

R. It is proved, by the testimony of witnesses, that the marriage of the first claimant took place before that of the second claimant, and it is therefore entitled to preference by reason of such priority.* The woman should, therefore, be delivered into the possession of the first claimant, as is laid down in the *Hidaya*,—"If they should specify dates to the marriage, the evidence of that party which specifies the prior date must be preferred." So also in the *Shurhi Viqaya*,—"If two persons lay claim that they married a woman one after the other, and adduce witnesses to the fact of their respective marriages, he who was prior in point of time should be preferred." The second claimant himself pleads, that he married the woman after she had been divorced by her first husband, but such second marriage must be considered null and void, because, during the period of *edit* or term of probation, her contracting a second matrimonial engagement is illegal; and it is not possible that, between the fifth and eighth of the same month, the necessary period should have elapsed. But if it be believed, that the first claimant really did divorce the woman, and it be proved that, although the divorce was reversible, he did not return to her, or that it was irreversible, in that case the marriage of the first claimant also becomes null and void. If, on the contrary, the woman does not prove a divorce, and the marriage be established by competent witnesses, she should be

A claimant pleading that he married a woman after her divorce, is sufficient proof of a former marriage as against him.

Of a second marriage during the term of probation.

* See Prin: Claims, &c. 4.

returned to the first claimant. After proof of marriage, the approbation of herself, or of her guardians, is a matter of no consequence, unless on the ground of inequality or other legal disqualification, which may have been decided to be a sufficient reason for the dissolution of a marriage contract.*

CASE XIII.

Q. Musst. Hinda and Zeyd lived together as husband and wife for a period of fifty-five years, and, on account of such a length of time having elapsed, there is no person in existence who witnessed the celebration of the marriage, but the acknowledgment of the marriage of Hinda, as made by Zeyd, may be proved by the testimony of witnesses and by documents. Under these circumstances is the marriage, according to the Moohummudan Law, established or not? If, according to the circumstances above-stated, the marriage is complete and binding, in what proportion is the widow entitled to inherit after the satisfaction of her claim of dower?

The proved acknowledgment of the husband is sufficient to establish a marriage, in default of better evidence.

R. If Zeyd lived in the same house with Hinda, and they cohabited as husband and wife for the space of fifty-five years, or if Zeyd acknowledged his marriage with Hinda before witnesses, this acknowledgment is sufficient in Law to establish the marriage. In case Zeyd died childless, his widow will be entitled to inherit one-fourth of his estate, and in case of his leaving a child, one-eighth; and if no specific sum be proved to have been stipulated as dower, she should be allowed her *muhr-misl* or proper dower; the payment of dower being incumbent on a husband in like manner as the

* For the Rules relative to Divorce, see Prin: Marriage, &c. 24 and 25, and for those relative to the interference of Guardians, see ibid. 14, 15, 16, 17, 18 and 19.

payment of his other debts. Heirs are not entitled to inherit the assets until the debt of dower is liquidated.*

CASE XIV.

Q. Is the marriage of an infant daughter, whose father's uterine brother is living, valid and lawful, without the consent of her uncle, but with the consent of her mother, maternal grand-mother and maternal grand-father?

Of marriage in the absence of a legal guardian.

R. The consent of the uncle cannot be dispensed with, unless he is at a distance of three days' journey, in which case the marriage is good with the consent of the relations above-specified.†

CASE XV.

Q. Supposing equality of condition in life between the parties, is the marriage of Asud Ali, son of Meerun Khan, with Musst. Imamun, valid, without the consent of her uncle, Ali Moozuffer Khan?

Of the paternal guardian's power over the marriage of an infant.

R. In the event of the bride being a minor and not adult, the contracting her in marriage rests with her guardians. Her guardians are her paternal relations, according to their proximity in the order of inheritance. A father's brother is among this description of relations. It is allowable for him to contract the infant in marriage, but she, on attaining the age of majority, has the privilege of dissolving the contract. So long as she

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* In this case, it is true, that besides the acknowledgment of the husband there was evidence of continual cohabitation, but either fact, duly established, would be sufficient to prove the marriage.

† Where there is no paternal guardian, the maternal guardian may dispose of an infant in marriage. See Prin: Marriage, &c. 19. For what constitutes such a distance as may be termed a three days' journey, see Precedents of Gifts, Case 9, page 206.

may continue a minor, it behoves the person who is entitled to the care of her, to prohibit her from going to the house of her husband, except when the husband of the minor pays her prompt dower. The authorities for this doctrine are in the *Buhr-oo-rayuq* and *Aulumgeeree*,—"If an infant be married, and desire to go to the house of her husband, without having received her dower, it behoves the person who had charge of her previously to marriage, to restrain her, until he who is entitled thereto has received on her behalf, her full dower." "When an uncle contracts the infant daughter of his brother in marriage for a specified dower, and delivers her to her husband, before taking the full amount of her dower, the delivery is improper, and she may be taken back to her own house." The marriage of a free adult and discreet damsel with a man equal in condition of life is good and valid, without the permission of her guardian; but the guardian may object, if there be not equality between the parties. And if a damsel being of sound discretion, though under age, contract herself in matrimony to an equal, and afterwards the guardian allow the marriage, it will be good; still she has an option on attaining majority. If she have no guardian, the validity of the contract will entirely depend on the pleasure of the minor when she shall have attained majority, as appears from the *Aulumgeeree*,—"*Kazee Budeeooddeen* was interrogated respecting an infant damsel, who contracted herself in marriage with her equal, having no guardian, and there being no *Kazee* present at the place. He answered: it is contracted, and depends on her pleasure after majority."*

They should enforce payment of dower.

Of the marriage of an adult woman, if the match be equal.

And if unequal.

And of a minor, if guardians consent.

And where there is no guardian.

* But she must declare her desire of annulling the contract immediately on coming of age. Otherwise, if she continue to live with her husband for any period subsequent to her majority, her right of effecting the dissolution of the marriage ceases. See Prin: Marriage &c. from 14 to 19.

CASE XVI.

Q. Does it appear from the evidence in this case that Lootfoonisa was legally married to Kubeeroddeen? If so, has Lootfoonisa, after she shall have attained the age of majority, a right to annul the marriage? Does it appear from the parties being connected by fosterage, or any other disqualifying cause, that the marriage should be considered null and void: and if the marriage was contracted in every respect strictly according to Law, and there should be no cause to avoid the same, is it requisite that Lootfoonisa should be made over to her husband, or should the care and protection of her be entrusted to her relations during her minority?

R. It appears from the evidence in this case that the marriage was legally contracted; but a woman has the option of annulling the contract of marriage, on her attaining the age of majority. If Lootfoonisa has not yet attained the age of majority, that is to say, if the signs of puberty have not appeared, she may, on her attaining that age, annul the marriage.* But if having attained the age of majority she remain silent, and do not immediately have recourse to judicial process, for annulling the contract, she will be left without option, and the marriage cannot subsequently be annulled by her. If it be proved that the parties are connected by the tie of fosterage, the marriage is null and void; but the fact is not sufficiently proved in this case. (Here follows a recapitulation of the evidence against the plea of fosterage.) Supposing Lootfoonisa not to have attained the age of majority, her mother is entitled to

Of a woman, married while a minor.

Of fosterage.

Of a mother's right of guardianship.

* A girl, however, who has been married during her minority by her father or by her paternal grand-father, is not at liberty to annul the contract on coming of age. She is only competent to do so, when the marriage may have been contracted by herself, or by some distant guardian on her behalf; that is by any other than the father or grand-father. See Prin: Marriage 18.

the charge of her, and she is at liberty to prevent the husband from removing her daughter to his house, until he shall have paid so much of the dower as may have been stipulated to be paid promptly.

CASE XVII.

Q. If a girl, of eleven years of age, enter into a contract of marriage, of her own free will and choice, without the consent and approbation of her mother or other guardians, is such marriage available in Law or not?

Circumstances under which minority ceases.

R. The answer to the question entirely depends on the fact of the girl's being adult or otherwise. If a girl exhibit certain signs of womanhood at the age of nine, ten, eleven, or up to fourteen years old, she is, in the language of the Law, denominated *baligha bilulamut* or adult by puberty. Should she exhibit none of those signs up to her fourteenth year, yet, on her attaining the age of fifteen years, she will be deemed an adult, and in the language of the Law will be termed *baligha bissin* or adult by majority. Under these circumstances if the girl alluded to in the question, being eleven years of age, should have shown signs of womanhood, she will be technically denominated *baligha bilulamut*, and will be at liberty to contract marriage with a person either her equal or inferior in condition, without the consent of her mother or other guardian. Such marriage is available in Law; in other words the contract does not infringe any positive legal rule. The mother or other guardian is not authorized to prevent the match, if she enter into a contract of marriage with a person equal in point of condition; but, if he be her inferior, they have a right to come forward and cause it to be set aside. In case of any doubt existing as to whether a girl has exhibited certain signs of womanhood, she

An adult girl may marry her equal without consent of guardians.

But if inferior guardians may interfere.

should be questioned as to the fact; and if she reply in the affirmative, she should be treated as an adult, otherwise as a minor; and, if the fact cannot be ascertained from her declaration, she should be considered as not having passed the age of minority, and in both the last mentioned cases, if, without the consent and approbation of her mother or other guardian, she should have contracted matrimony, either with her equal or her inferior, the marriage is good in Law; in other words, the contract does not infringe any positive legal rule: but her mother or other guardian has, at any time,* a right to come forward and to cause the marriage to be set aside.

Evidence of puberty.

The guardians may set aside a minor's marriage, whether with an equal or an inferior.

CASE XVIII.

Q. 1. A girl having attained the age of twelve, of thirteen, or of fourteen years, asserts that she has arrived at the age of puberty. Is such assertion to be credited or otherwise?

R. 1. An assertion either by a male or a female of their having attained the age of puberty, after they are twelve, or thirteen, or fourteen years old, should be credited and received as conclusive, according to the *Viqaya*,—"If they are adolescent and shall assert their puberty, they must be believed and treated as persons who have arrived at the period of puberty."

Assertion of puberty when admissible.

Q. 2. If the mother of such a girl as that described in the preceding question, should claim the charge or custody of her, is such claim admissible?

* That is at any time before the birth of a child. After she has borne a child to her husband the Law will not permit of any interference on the part of the guardians, to set aside the contract. Such is the doctrine contained in the *Kifaya*. See Prin: Marriage, &c. 14, 15, 16, and 17.

Mother's guardianship when determinable.

R. 2. The mother has no right to the charge or custody of her daughter under these circumstances; because the mother and grand-mother are entitled to the custody of the daughter, only until the period of puberty, according to the *Viqaya*,—"The mother and the grand-mother have power over the daughter until she menstruates."

Q. 3. Is such a girl as that described in the preceding question, at liberty to dispose of herself in marriage without the consent of the mother; she having lived apart from her mother from the time of her childhood?

An adult woman may contract herself in marriage.

R. 3. The marriage of a girl arrived at puberty, depends entirely on her own inclination. She is not dependant on the will of the guardian who has the greatest power, much less on that of the mother; according to the *Viqaya*,—"The marriage of a free woman possessing mature judgment, is valid without the consent of a guardian, although contracted with one not equal in point of condition.*

Q. 4. To what period does the Law allow a mother to retain any power over her daughter, and on what particular occasions does it admit the exercise of the

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* This doctrine, however, maintaining the validity of a marriage, is not to be understood as absolutely precluding all right of interference on the part of the guardians under any circumstances; on the contrary they are expressly authorized to interfere in the case of a marriage contracted by such a woman with a person not being her equal in condition of life. See the Law as laid down in the case of Ali Moozuffer Khan versus Wulee Khan and others, page 264, Case 15.

The distinction between the case of a female who has attained the age of puberty contracting marriage, and one who has not attained that age, is, that in the former case the marriage is valid, but voidable by the guardians where inequality appears, and that in the latter case the contract is void *ab initio* if entered into without the consent of the guardians; but such consent may be implied as well as express.

power? How long does the right of custody continue, and can the mother retain it over a daughter who asserts that she has attained the age of puberty?

R. 4. The power of a mother over her infant daughter merely extends to the exercise of her right of custody, and the right of custody continues from the time of giving milk to the time of menstruation.*

Mother's guardianship wherein consisting.

CASE XIX.

Q. 1. A person died, leaving a wife, and a son by that wife, and a son by a slave girl to whom he was not married, who was the slave of another person, and who had been before married to the slave of a third person. After his death, the son by his wife took possession of all the property, and he also dying, his mother succeeded to a part of the estate, the rest being taken by the son of the slave girl above-mentioned. Under these circumstances, has the last named person a right to succeed to any part of the inheritance; and if so, to what proportions are he and the widow of the original proprietor respectively entitled?

R. 1. According to Law, the son of the person by the slave girl, to whom he was not married, who was the slave of another person, and who had been before married to the slave of a third person, cannot be considered as the legitimate issue of that person; nor is he entitled to inherit any part of the property. His having taken any portion of the estate is illegal. The entire property belongs of right to the married woman and her

* The reply to this question supposes that there are paternal relations; but where they do not exist, the power of giving away her daughter in marriage is vested in the mother.

issue by the deceased. Authorities,—"To establish the parentage af a child begotten on any woman, it must be proved that she is the *consort** of the imputed father." It is laid down in the *Shurhi Viqaya* in the chapter treating of *post obit* manumission and of claim of parentage that, there are three descriptions of *consorts;* inferior, secondary, and principal. The inferior *consort* is a female slave, the parentage of whose offspring is not established in her master, until he claim it; but, when the master claims the parentage, the female slave becomes an *oom-i-wulud,* which is the secondary description of *consort,* the parentage of whose offspring is established in the master without his making claim, but whose offspring may nevertheless be disclaimed by the simple denial of parentage on the part of the master. The principal *consort* is the married woman, the parentage of whose offspring is established without any claim on the part of the husband, and whose offspring cannot be disclaimed by his simple denial of parentage, nor without recourse to imprecation." The woman described in the question does not come under any one of the three descriptions above-enumerated, and consequently the deceased cannot be considered as the parent of her offspring; but they should be accounted the children of the slave to whom she was espoused. The widow is entitled to an eighth, and the son, as residuary, to the remainder, as is laid down in the *Sirajya,*—" An eighth with children or sons' children in any degree of descent." "The offspring of the deceased are his sons first, then their sons in how low a degree soever."

Three descriptions of *consorts.*

Parentage of their offspring how severally established.

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* I have used the term *consort* as appearing to me the most appropriate English term by which the word *firash* can be rendered. Meninski translates it,—" *Lectus grabbaton et per metaphor mulier conjunx.* The term " *concubine*" is too ignominious in its ordinary acceptation, though, perhaps, taken in its strict sense, the translation would be more accurate.

Q. 2. Supposing the slave girl above-mentioned to have been the property of the imputed father, though before married to the slave of another person, will this fact make any alteration in the case?

R. 2. The fact stated does not make any alteration in the case. The child in question will still be considered the son of the man to whom the slave girl was espoused. It is stated at the end of the fourth chapter of the *Foosool-i Imadeeya,* that "the parentage of children of a female slave is established in the husband of such slave, and not in her master, even though her master should claim them;" and the reason is that the inferior *consort* cannot be put in competition with the principal one.

The master of a married female slave cannot be considered the parent of her offspring, even though he claim them.

CASE XX.

Q. Two persons contract matrimony with each other, at a period when the bridegroom was only ten years old, and the age of the bride did not exceed eight or nine years. On the occasion of the celebration of the marriage, the bridegroom, in the presence of witnesses, orally made a settlement on his wife of several thousand rupees, which he engaged to pay her. Some time after the marriage, the husband and wife disagreed, and the latter retiring to the house of her father, some years after brought an action against the former, on the plea of his having divorced her. Under these circumstances is the sum which the defendant acknowledged *ore tenus* in his minority, to be due on account of dower, recoverable from him or not?

R. Under the circumstances stated, the sum which the defendant, during his minority, acknowledged to be due on account of dower, is not recoverable from him; because the acknowledgment of a minor is not legally

Dower fixed during the minority of the husband not recoverable.

binding, unless the marriage of the minor was contracted with the consent of his guardian, and unless the sum agreed upon as dower, was fixed conformably to his directions: in which case, if complete retirement took place after puberty, the whole amount specified as dower is claimable, otherwise the husband is compellable to pay half the amount only. Divorce by a minor has no legal operation, as is laid down in the *Hidaya*, "The divorce of every husband is effective, if he be of sound understanding and mature age, but that of a boy or a lunatic, or one talking in his sleep is not effective, because the prophet has said,—" Every divorce is lawful excepting that of a boy, or a lunatic, or of one talking in his sleep." A question was put to *Cazee Budee-oodeen* respecting a girl under age, who had contracted herself in marriage, having no guardian and there being no judicial authority at the place. He replied that the contract was suspensive, and would become valid by her consent, after her attaining the age of puberty. Such also is the doctrine contained in the *Buhr-oorayiq.*

Of persons incompetent to pronounce divorce.

CASE XXI.

Q. A person, being on his death-bed, but in the full enjoyment of his senses, acknowledged that he was indebted to his wife in a certain sum. He executed an obligation to that effect, reciting that the deed of dower, specifying the amount that was stipulated, had been lost, and he moreover executed a deed of gift in favour of his wife, making over to her his entire property, in lieu of the dower claimable by her. Three or four days afterwards, he died of the sickness with which he was afflicted. Under these circumstances, are the obligation and deed of gift above-alluded to good and valid according to Law or otherwise?

R. According to Law, the acknowledgment of a man, on his death-bed, in favour of heirs, is null and void; and a wife is an heir. But, should a man, in his last sickness, acknowledge a debt to be due to his wife on account of dower, the acknowledgment will be good to such extent of the property as amounts to her proper dower, or such as it has been customary for her equals in condition to receive, but to no more. A gift, on a death-bed, without delivery, is totally null and void.

A death-bed acknowledgment of dower will not avail for more than the average sum.

CASE XXII.

Q. A woman claims from her deceased husband's estate the sum of one lack and twenty-five thousand rupees, alleging that to be her proper dower and the amount usually settled on her female relations. Two witnesses to the marriage, adduced by her, state that twenty-five thousand rupees and two gold mohurs was the sum fixed as dower. Under these circumstances, is the widow entitled to receive, in satisfaction of dower, the amount stated by the witnesses as due, or that which she alleges to be her proper dower?

R. It appears, that the claimant states her proper dower at one lack and twenty-five thousand rupees, but two of the witnesses, who were employed as agents in conducting the negotiation of the marriage, and who were invested by both parties with full powers, declare that the sum of twenty-five thousand rupees and two gold mohurs was fixed as dower. Consequently her claim, supposing the witnesses to be unexceptionable, is good for that sum, and no more. The sum to which she is entitled, as stated above, is termed in the language of the Law *express* dower, while that which she claims as her *proper* dower is termed *unknown;* and it is frequently found difficult to ascertain its amount with any degree of precision.

Where dower has been *expressly* fixed, there is no right to the *proper* dower.

CASE XXIII.

Q. 1. A Moosulmaun dies, leaving moveable property in the hands of his widow. Now his creditors desire to realize their debts out of his estate, and his widow, in opposition to them, sets up a claim of dower. Under these circumstances, supposing the property left to be insufficient to liquidate all the debts and the claim of dower, what is to be done? Is the claim of dower to be considered preferable to the claims of other creditors, or should they be considered to be on an equality, and a *pro ratâ* distribution made among all the claimants, or in what mode?

No distinction between claims of dower and of other debts.

R. 1. The claim of the widow for dower, payable out of her deceased husband's estate, is just, and the claims of the other creditors, for the payment of their debts out of the estate, are also just. Under these circumstances, after the ascertainment of the amount of the dower and of the sum due to the creditors of the deceased, the whole property, moveable and immoveable, must be collected, and it must be examined, with a view to find out whether or not it is sufficient to satisfy all the claims. If so, it must be appropriated in that manner, and if not, each person must get a proportional share. The Law makes no distinction between a claim of dower and other debts. No preference is given to one description of claim over another, and a *pro ratâ* distribution must be made with respect to all.

Q. 2. According to the Moohummudan Law, how is the right to dower and its amount established; and under what circumstances is it claimable and payable?

Dower proveable like other claims.

R. 2. A claim of dower is established by the same means as other claims, and, when disputed, the proof

consists in evidence. A decision should be passed in favor of the party, who adduces evidence of right. If both the parties, or neither of them, adduce evidence, the proper dower must be paid, that is to say, a dower must be paid equal to the amount received by the paternal aunt or sister of the wife.* The dower becomes due on the consummation of the marriage, or the death of either of the parties, or on divorce. Should the wife not claim the payment of it, during the life-time of her husband, it must be paid to her out of the property left by him on his decease.†

When due.

CASE XXIV.

Q. Is the debt claimed by the defendant legally proved, and, if so, the whole of the property, real and personal, of her deceased husband being absorbed in such debt, is it to belong of right to his widow, or is it to be distributed among the heirs generally?

R. It has been proved, by the testimony of three competent witnesses, that the debt due to the defendant from her deceased husband on account of dower, amounted to ten thousand gold mohurs and twenty-five thousand rupees, and a debt legally proved cannot be satisfied but by compromise or liquidation. So long as the debtor lives he is responsible in person, and, on his death, his property is answerable; but there is this distinction between money and other property in cases of dower, namely, that the widow is at liberty to take the former description of property, over which she has absolute power; but as to the other property, she is entitled to a lien on it, as security for the debt, and it does not become her property absolutely, without the consent of the heirs or a judicial decree. Where the

Distinction between money and other property in cases of dower.

* See Prin: Claims, &c. 30 and Note. † Prin: Marriage, &c. 20.

debt is large and the estate small, the former necessarily absorbs the latter, in spite of any objection urged by the heirs, who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate.

CASE XXV.

Q. If there be no deed of dower, and the amount thereof cannot be established by witnesses, how much dower will the wife be entitled to receive from her husband?

Dower where no sum fixed.

R. She will be entitled to receive her proper* dower, and if this be not ascertainable, she is by Law entitled to receive ten *dirms*.

CASE XXVI.

Q. A husband assigns over to his wife, by deed, all his property, moveable and immoveable, in satisfaction of her dower; but the wife does not take possession of the property. Under these circumstances, is the ownership of the husband entirely divested, or not?

Seizin not requisite in cases of property exchanged for dower.

R. Under the circumstances above stated, all the property specified in the deed becomes liable for the satisfaction of the wife's dower, whose right thereto is completely established, and the ownership of the husband is entirely divested. In this case, seizin is not a requisite condition. Any valuable commodity may be assigned in satisfaction of dower, provided it admit of identification.†

* The *muhr misl*, as it strictly signifies, is the average amount received by females of the same family, as their dower. The *minimum* exigible as dower is ten *dirms*.

† The reason of this opinion is, that an assignment in satisfaction of dower, or in lieu thereof, is not an absolute gift, in which case seizin would be necessary, but rather resembles a sale or an exchange, being a

CASE XXVII.

Q. A widow, during the life-time of her husband, remitted to him the debt due to her on account of dower, (whether such remission be *per se* legal or illegal) is it rendered illegal by her having executed a deed, specifying the remission, contrary to the usage of the country?

Of remission of dower.

R. The remission of dower on the part of a wife is legally correct. It amounts only to making a debtor the proprietor of the debt due from him. The remission therefore being authorized, the deed in which it is specified must be legal, whether contrary or conformable to the usage of the country; for usage, legally speaking, is always inoperative in opposition to that which is sanctioned by Law. The remission however will not be established merely by the legality of the deed, but evidence must be taken as to the fact of the remission; for a deed is available as evidence, but is not conclusive as to proof.

CASE XXVIII.

Q. Supposing a childless woman to remit to her husband her claim of dower, to what proportion of his estate will she be entitled on his decease, the other claimants being a sister and a paternal uncle?

Remission of dower does not affect the right of inheritance.

R. After the liquidation of the debts of the deceased, and the performance of other requisite duties antecedent to the adjustment of the claims of inheritance, the estate will be made into four parts, of which the widow will take one as her legal share or a fourth; the uncle one, and the sister the remaining two. The remission

gift for consideration. It is, in other words, a commutation of money for goods, in which case (See Prin: Sale 12) it is lawful to stipulate for a future period of delivery; consequently immediate seizin cannot be requisite to the validity of the contract.

by the wife of her claim to dower does not by any means affect her right to the share of the inheritance to which she is entitled by Law.

CASE XXIX.

Q. 1. Is the sum of money stated to be due to the wife in the deed of dower (in which there was no mention made as to whether the payment should be prompt or deferred) claimable by the wife during the life-time of her husband? and supposing the wife to have died childless before her husband, not having made any claim of dower during her coverture, which lasted for a very considerable length of time, is her brother's son entitled, in right of inheritance, to claim it from the husband, or, after his death, from his representatives? and supposing him to have a just claim on the estate on that account, what portion of the dower should devolve on him in right of inheritance.

Of a deed of dower not specifying whether the payment shall be prompt or deferred.

R. 1. The sum specified in the deed of dower (presuming it to be genuine) was due, in the life-time of the wife, and during her coverture; that is to say she was at liberty to claim it from her husband. If she omitted to claim it and died childless before her husband, without having compromised or resigned her right to dower, her brother's son is legally empowered, as heir, to claim it from her husband or his representatives; but half of the dower lapses to her husband in right of inheritance, and the other half belongs to the brother's son of the wife, supposing her to have left no other legal sharers or residuaries.*

* This is one of the few cases in the code of Moohummudan Law in which there is so much uncertainty, from the conflicting opinions of equally respectable authorities, that it is difficult to ascertain to which the greater preference should be assigned. There may be a stipulation for prompt payment of dower, or for deferred payment, or there may be no mention whether it is to be deferred or prompt. In the first case and

Q. 2. It appears that the husband and wife mutually executed a will in favour of each other, to the effect that they should be reciprocal heirs, and that, whichever of them died first, the estate of the survivor should not be subjected to any charge on account of the deceased. Now supposing the dower to have been due from the husband up to the date of the execution of the will, and that the wife did not in any other manner resign or compromise her right, is such will sufficient to bar all claims against the estate of the husband on account of dower?

Dower not extinguished by mutual testament of husband and wife in favor of each other.

R. 2. The claim on account of dower cannot be extinguished by the will which the husband and wife mutually executed in favor of each other. The husband cannot in any manner be exonerated from the debt of dower, except by its liquidation or by its being expressly given up by the wife, and the sum due on that

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the last the prevalent doctrine appears to be that the whole should be paid promptly. This is the opinion of the compiler of the *Hidaya* and of the *Futawa-i Hummadee*, and they assign as a reason that marriage is like all other contracts, in which, if it be not expressly stipulated that the payment of the consideration shall be deferred, it must be paid immediately as a matter of course; and that dower is the consideration of marriage. The author of the *Shurhi Viqaya* and of the *Futawa-i Aulumgeeree* (citing *Kazee Khan* as authority) on the other hand, maintain that where no mention has been made of the period of payment in cases of dower, such portion should be withheld as it may have been customary to withhold until a future period. Payment, according to the more received doctrine, may be deferred to a future period, not ascertained, provided it admit of being reduced to a certainty. For instance it is allowable to postpone the period of the payment of dower till the death of the husband or divorce. This doctrine is held in the *Futawa-i Aulumgeeree* and the *Mooheet Oosurukhsee* is cited as the authority. Other authorities however seem to object to precedent conditions admitting of a great degree of uncertainty as to their occurrence, or as to the period of their occurrence. As dower is claimable without a condition on death or divorce, it is needless to argue with reference to those conditions. But it is reasonable and consonant to the spirit of laws in general, to admit the validity of suspending payment until the husband's death,—"The condition must bear reference to an event which may or may not happen. If it relate to a matter which certainly will happen it is not properly a condition, but is equivalent to a term of payment. Thus a bill of exchange on the death of a person named is valid, being payable on that event as at a term."—*Colebrooke on the Interpretation and Effect of Conditional Obligations, Chap. IV.* § 201.

account is claimable from him during his life-time, and from his estate after his death.

CASE XXX.

Q. A husband executes a deed of dower in favor of his wife, settling upon her ten thousand gold mohurs and fifty thousand rupees; and specifying that the payment of a *part* should be prompt, and that the payment of the remainder should be deferred. The amount payable promptly is not defined. Under these circumstances, according to Law and the usage of the country, how much of the stipulated dower should be paid promptly and how much deferred until after the death of the husband?

Of dower, the portion payable promptly not being defined.

R. As the deed stipulates a specified amount of dower, there is not such a degree of uncertainty as entirely to invalidate the claim; but it is stated that a *part* is to be paid promptly, which leaves the amount of the remainder, to be paid at a deferred period, uncertain. According to Law, in such a state of uncertainty, recourse must be had to local usage. This marriage appears to have been contracted at *Moorshedabad*. The practice therefore which obtains with respect to deeds of dower at that and the adjacent places should be followed. In general it is stipulated that the payment of one-third shall be made promptly and that of the other two-thirds deferred; and it is also usual to stipulate that the payment of one-half shall be prompt, and of the other half deferred. The adoption of the former practice, therefore, is, in this instance, allowable; but the adoption of the latter is in all instances more certainly equitable.*

* The above rule however was by no means laid down as a principle to be adopted on all similar occasions. The usage of the country is the only legal rule to be observed in controversies of this description. Had

CASE XXXI.

Q. 1. Has a wife a right to oppose the inclination and resist the authority of her husband, before she has received her dower, notwithstanding the previous interchange of conjugal habits, without objection on her part?

Payment of dower being unjustly withheld, the wife owes no allegiance.

R. 1. If it have been stipulated that a portion of the dower is to be paid immediately, she has a right to do so, with a view to obtain that portion of her dower. So also if no mention have been made of the immediate payment of any portion, she may do so, with a view to obtain such a portion, as may be consistent with her situation in life, unless the postponement of the payment of the whole had been expressly stipulated; according to the *Munnih-ool Ghuffar*,—"She is competent to preclude him from the enjoyment of conjugal rights, or from carrying her on a journey, or removing her from one house in a town to another, (although matrimonial intercourse may have passed between them and the marriage may have been consummated, without any objection on her part,) for the purpose of obtaining a portion, or the whole, of the dower, prompt payment of which was stipulated, or for the purpose of obtaining such a portion of it, as is usually paid promptly to her equals in condition, unless the payment of the whole was expressly postponed: according to *Aboo Yoosuf*,—"She has a right by a favourable construction in this case also; and opinions have been given according to this doctrine on a principle of favourable construction." Such also is the doctrine contained in the *Doorur-i Mokhtar*,—"She is competent to preclude him from the

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there been no mention whatever whether the dower should be prompt or deferred, the whole must be considered to be promptly due. ' See Prin: Marriage, &c. 22. This is unquestionably the Law, and the author of the *Shurhi Viqaya* admits it to be so, although he states that occasionally, in modern practice, respect is paid to the peculiar usages of the place in which the cause of action may have originated.

enjoyment of conjugal rights; and according to *Aboo Yoosuf,* even although the payment of the whole dower was expressly postponed. Opinions have been given according to this doctrine on a principle of favourable construction." Therefore, before the dower that may be due is paid, the husband has no right to force and compel his wife to come to his house.*

Q. 2. Is the wife, under the above circumstances, after her disobedience, entitled to maintenance? and is she, before receiving the dower which was stipulated to be paid promptly, at liberty to depart and leave her husband's house?

And is entitled to maintenance.

R. 2. She is entitled to maintenance under such circumstances, notwithstanding the fact of her having opposed the inclination of her husband, and she may depart and leave her husband's house, unless he pay the dower which was stipulated to be promptly paid.

Q. 3. Under the above circumstances, is the stipulated dower due from the husband, after consummation?

And dower nevertheless due after consummation.

R. 3. It is due, as appears from the authorities above-quoted,—"It (the dower) becomes due on consummation, or complete retirement, or the death of either party;" and this is the doctrine laid down in all the legal authorities.

CASE XXXII.

Q. 1. Is there any fixed period, according to the Moohummudan Law, beyond which a claim of debt

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* The received opinion however is, that if it have been expressly stipulated that the payment of the whole of the dower shall be deferred to a future period, the wife has no right to claim a part before the arrival of such period, inasmuch as her right was voluntarily surrendered by herself.

cannot be preferred? and is a debt of dower considered in the same light as other debts, or are there any peculiarities attending it?

No limitation of period to bar a claim of dower.

R. 1. There is no fixed period beyond which payment of dower cannot be claimed, and a claim of dower is considered in the same light as other claims, which cannot be defeated without satisfaction by the debtor or relinquishment by the creditor; as is laid down in the *Kafee*,—"A debt of dower is viewed in the same light as any other debt which has been contracted by a stranger, and the claim of payment cannot be defeated until the debtor liquidate it, or the creditor relinquish his claim." So also in the *Foosool-i Imadeeya*,—"Payment of a wife's dower is incumbent on the husband, in like manner as the payment of his other debts, and, until satisfaction is made, the estate cannot be distributed among his heirs."

Q. 2. If a widow did not demand her dower, which was stipulated to be paid promptly, during the life-time of her husband, and he did not liquidate any part of it, is the period of limitation (supposing there to be any) to be reckoned from the date of the marriage, or from the date of the husband's death?

Even though immediate payment was stipulated.

R. 2. There is no period of limitation fixed for preferring a claim to dower, or other debts. The attempt therefore is needless to fix a period for the claim of dower to be preferred, even though it was stipulated to be paid promptly; but it became due from the date of the marriage, and if the husband, during his life-time, did not discharge that part stipulated to be paid promptly, it, as well as the part the payment of which was deferred, should be realized from the estate.

Q. 3. If it was agreed that one-third of the dower should be paid promptly, and the remaining two-thirds deferred, and the wife, during the life-time of her husband, did not demand payment of the prompt dower, and the husband did not liquidate any part of it, although he, after the comsummation of the marriage, was living for thirty-four years; under these circumstances, according to the Moohummudan Law, is there any distinction between the prompt and deferred dower?

All claimable on the husband's death.

R. 3. Under the circumstances stated, according to the Moohummudan Law, there is no distinction between the prompt and deferred dower, that is to say, the widow has a lien for both descriptions of dower on her husband's estate.

Q. 4. If the husband, in his life-time, gave any thing to his wife beyond the necessaries of food and clothing, should such presents be deducted from the debt of dower or not? And is it incumbent on the heirs of the husband to satisfy the widow of the accuracy of their accounts?

Dower how affected by husband's donations.

R. 4. If the husband gave either money or effects to his wife beyond the necessaries of life, in consideration of her dower, such presents should be deducted from the debt of dower, and in this case it is incumbent on the heirs to satisfy the widow of the accuracy of their accounts; but if he gave them *gratis*, it is a voluntary donation, of which no account need be taken, as is laid down in the *Hidaya*,—" If a husband were to send any thing to his wife, and she were to denominate it a present, while he asserts that he has given it in part payment of her dower, in this case the declaration of the husband must be credited."

Q. 5. Supposing that no claim of dower can be preferred, either by reason of the omission to prefer it within the stipulated period, or by reason of its having been discharged by the husband during his life-time, is the widow nevertheless competent to obtain her legal share of inheritance together with the other heirs of her husband? If so, what portion will she obtain as her legal share?

R. 5. By the first reason assigned, the claim of dower cannot be defeated, because there is no fixed period of limitation to a claim of dower; nor can the length of time elapsed since the marriage have that effect, insomuch that even were it, for such reason, declared to be forfeited by judicial authority, such decree would be null and void, as is laid down in the *Foosool-i Imadeeya*,—"If a *Kazee* annul the claim of dower on any other ground but that of evidence to her having received it, or her own acknowledgment to that effect, relying on the vulgar doctrine, that length of time since a marriage was contracted affords presumption that the dower was either liquidated or relinquished, such order is null and void." So also it is laid down in the *Ashbah-o Nuzayir*. But if the claim of dower be rejected by reason of its having been liquidated during the life-time of the husband, the widow is nevertheless, after the death of the husband, competent to inherit her legal share together with the other heirs, even should there be children; and if there should be no child, her share is one-fourth, as is laid down in the *Sirajya*,—"Wives take in two cases; a fourth goes to one or more on failure of children, and son's children, how low soever; and an eighth with children or son's children, in any degree of descent."*

Claim of dower cannot be rejected on presumptive evidence.

After satisfaction of dower the widow is entitled to her legal share as one of the heirs.

* It may be a question, how far the rules of limitation laid down in section 14, regulation 3, 1793 and the subsequent enactment (2 of 1805),

CASE XXXIII.

Q. A woman, on the occasion of her marriage, had a certain sum of dower settled upon her. The agreement was duly witnessed, but no deed was executed, nor was the agreement reduced to writing in any shape. Is such a mode of proceeding regular, and can the woman recover at Law the amount stipulated for? Are the mother and brother of such woman competent, after a period of more than twelve years has elapsed since her death, to sue the husband for the recovery of the dower? Subject to what limitation of time is a claim of this nature preferrible, and, after the death of the woman in question, in what proportion should the estate left by her be distributed among her husband, her mother and her brother?

In a case of dower deed not necessary.

R. The proceeding in this case is perfectly regular and proper, and a claim of dower, supported by witnesses, though not reduced to writing, is in all respects valid according to Law? The mother and brother of the deceased woman are competent to prefer a claim against the husband for half the dower agreed upon, even though a period of more than twelve years may

should be held to apply to a demand of dower. There can be little doubt, I should suppose, that the rules of a positive enactment supersede the tenets of the Moohummudan Law; but, if the circumstance of the cause of action having originated twelve years before the institution of the claim, be deemed an insuperable bar, there would be very few widows who could obtain their dower, nor would they be likely to save their claim by proving an intermediate acknowledgment on the part of the husband; for, supposing the parties to have lived amicably together, a demand of payment would not only be unusual but disreputable. I find that the provisions of the Scotch Law exactly coincide with this view of the question.—" Prescription does not run *contra non valentem agere* against one who is barred, by some legal incapacity, from pursuing; for in such case, neither negligence nor dereliction can be imputed to him. This rule is, by a favorable interpretation, extended to wives, who, *ex reverentiâ maritali*, forbear to pursue actions competent to them against their husbands, but every prescription runs against wives in favour of third persons."—*Erskine's Principles of the Law of Scotland, page* 369.

have elapsed.* This circumstance does not invalidate the claim. On the death of the woman her heirs were her husband, her mother and her brother, and the property should (see Prin: Inh: 64) have been made into six parts (the husband's share being one moiety and the mother's one-third), of which the husband was entitled to three, the mother to two and the brother to the remaining one as residuary.

Widow's heirs may claim her dower at any time.

Of a husband with a mother and brother.

CASE XXXIV.

Q. A person executes a deed in favor of his wife at the time of his marriage, she being at that time only six, or seven, or nine, or, at the most, ten years old. The husband dies in about a year and eight or ten months after the marriage. Under these circumstances, has the wife any right to succeed to the property of the deceased, in virtue of the deed of dower so executed?

R. Under these circumstances, whatever was settled, ascertained, specified and inserted, in the deed of dower, becomes due on the death of the husband, in conformity to such deed, the provisions of which must be upheld, according to the *Hidaya*,—" If a person specify a dower of ten or more *dirms*, and should afterwards consummate his marriage, or be removed by death, his wife, in either case, has a claim to the whole of the dower specified; because, by the decease of the husband, the marriage is rendered complete, and every thing becomes established and confirmed by its com-

Whatever was specified as dower is claimable on the death of the husband, without reference to the age of the wife.

* However questionable may be the propriety of applying the limiting regulations (see Note to the preceding case) to the case of the wife herself, who, for obvious and natural reasons, may have omitted, during a period of more than twelve years, to adduce her claim to dower, yet there can hardly be any doubt of the legitimacy of its application to supersede the doctrine of the Moohummudan Law, in such an instance as the present, where a period of more than twelve years elapsed between the death of the widow and the institution of the claim of dower on the part of her heirs.

pletion, and consequently is so with respect to all its effects."* If the husband during his life-time pay the debt due to his wife on account of her dower, it is well, otherwise it must be defrayed from the property left by him. Dower must be satisfied before claims of inheritance, and the heirs have no title to any part of the property, if it does not exceed the amount claimable as dower. The earliest period of puberty, with respect to a girl, is *nine* years.

Earliest age of female puberty.

CASE XXXV.

Q. 1. Is the deed of dower legally valid and binding, or not, and according to Law and the custom of the country, notwithstanding that the married woman may not have been divorced, is the amount a debt due from the grantor of the deed and his heirs, and claimable by the heirs of the wife? or is such deed of dower only given to prevent divorce, and not due on the death of the husband or wife, should no divorce have taken place?*

Stipulated dower, however excessive, is recoverable at Law.

R. 1. The deed of dower granted in favor of a free woman in this case, has been proved to be good by the evidence of the deputy *Kazee* and of witnesses, and the amount due on account of dower, as specified in the deed, is due from the husband on complete consummation, without a divorce taking place. It is claimable on the husband's passing a divorce, or on his death; and the payment of it, on demand of the wife or her heirs, is incumbent on him, in like manner as the

* The amount of dower in this case was excessive, and the sum stipulated was far beyond the husband's capacity of paying. As dower becomes payable on divorce, it is a frequent practice in India to stipulate on behalf of the wife for a larger amount than the husband is capable of paying, with a view to prevent the possibility of divorce; and the question in this case was put to ascertain wheter such a promise on the part of the husband was to be considered *bonâ fide* and binding, or merely nominal and as a device.

payment of his other debts; after the death of her husband his heirs must pay the dower out of the deceased's property, if he leave assets.

Q. 2. A husband, (as in this case,) having executed a deed of dower in favor of his wife, made over that deed to her at the time of the marriage, and the wife died before the husband, without having become possessed of any of the property specified in the deed. Under these circumstances, is it lawful, or otherwise, for the heirs of the widow to take possession of the property retained by the husband; and, supposing those heirs not to have become seized of such property during the life-time of the husband, do the heirs of the husband succeed to his property, in virtue of their right of inheritance, or the heirs of the wife, in virtue of the deed of dower?

The assignment of a husband's whole property in lieu of an unspecified portion of dower, is null and void.

R. 2. There are two circumstances specified in the deed of dower in question, the one the amount of dower due from the husband, the other the gift of all the property, real and personal, money and effects, possessed by the husband, in lieu of a portion of the dower; but as the second condition is a contract of exchange, and as the value of it, which is a constituent part of the dower, is unascertained, such contract is imperfect, and the wife therefore has no right over the property possessed by her husband.* But she and her heirs have a right to demand from him during his life-time, and after his death from his heirs, the amount of the debt specified as being due on account of dower. Therefore, after the death of the husband, his heirs will have a

* The doctrine maintained in this opinion is founded on a well known principle of Moohummudan Law, that in all contracts of exchange the value of the articles opposed to each other should be ascertained and defined.

right to possess themselves of his property, but the heirs of the wife have a right to receive from them the sum specified, by procuring a public sale to be made of the property left by her husband, and possessed by his heirs; or if the heirs of the husband consent, they may take so much of the property as shall equal in value the amount of the wife's dower.

CASE XXXVI.

Q. A person executes a deed of dower in favor of his wife, purporting to convey to her the proprietary right in certain lands, of which he himself was not then proprietor, but which subsequently came into his possession. Is such deed valid and binding according to Law?

Case of property assigned as dower, not in possession of the husband.

R. Under such circumstances, the deed of dower is utterly nugatory and void, unless the husband, subsequently to his acquiring the right to the lands specified in the deed, put the wife into formal possession of them. In this case the deed will be valid and binding, but not otherwise.

CASE XXXVII.

Q. Supposing a certain deed of dower to be a valid instrument, does the Law require that the sum therein specified should be paid to the widow of the deceased person who executed it, previously to satisfying claims of inheritance out of the property left by him; and the total value of the property left not exceeding what is sufficient to cover the widow's claim of dower, and she having undertaken to liquidate his just debts, is it allowable for her, under such circumstances, to take his landed estate and effects into her own possession, and of her own authority, in virtue of her claim of dower?

No maximum in dower.

R. The deed of dower in this case is valid, having been proved by witnesses, for, although the specification of excessive dower is not sanctioned by any express authority, yet it is permitted, and therefore the sum mentioned in the deed is due to the widow from the landed estate of the deceased husband and demandable prior to claims of inheritance. But landed property which may not have been distinctly mentioned in the deed, cannot be taken possession of by the widow, of her own authority, in virtue of her claim of dower, without a judicial order, whether the property left be more or less than sufficient to liquidate her due. She can only become a proprietor of such property by making a purchase of it with the money of her dower, either in pursuance of a judicial order, or by the consent of the heirs. Property distinctly specified in the dower, she may take, by her own authority, without a judicial decree or the consent of the heirs. But, as the adversary of the widow in this case has accepted the management of the landed estate, for her benefit, agreeing to pay to her the rents and profits thereof, without reservation, and has refused to undertake the payment of a proportional share of debt due by the deceased husband, the whole of which the widow has undertaken to liquidate, this amounts to proof of his having acquiesced in the widow's taking possession of the property.

Landed property may be taken in satisfaction of dower, with the implied consent of the heirs.

CASE XXXVIII.

Q. A man executes a deed of dower in favor of his wife, settling upon her a specific sum of money. In the same deed he states, that he has given to his wife all the money and effects and all the property, real and personal, of which he was then in possession, or of which he may thereafter become possessed, in exchange

for her dower, on the condition that whenever she demanded her dower he would pay it, conformably to Law, without excuse or evasion. Under this deed, is the wife entitled to all the property, personal and real, of her husband, or is she only entitled to the specific sum mentioned in the deed?

Of a deed specifying a certain sum as dower and assigning in lieu thereof all the husband's property, whether in possession or expectancy.

R. The expression used by the husband that he had given to his wife all the money and effects and all the property, real and personal, of which he was then in possession, or of which he might thereafter become possessed, in exchange for her dower, amounts to a declaration of an illegal contract of sale, that is to say, a declaration to sell, in one and the same bargain, the property then possessed by the vender and also property which was then non-existent, or which might thereafter come into his possession, without any specification of its value. The expression above-adverted to is not declaratory of a gift for a consideration, which depends on the existence of the things reciprocated. Besides, in cases of sale and gift, it is necessary that the consent should be expressed in the place in which the tender was made; and if, before the expression of consent, the tender should be retracted, it is thereby rendered null and void. In this case it does not appear that consent was expressed after the declaration. On the contrary, from the concluding part of the sentence, conditioning that, whenever she demanded her dower, he would pay it conformably to Law, without excuse or evasion, it is inferrible that the husband did retract his declaration; because, if consent had been expressed in the place where the declaration was pronounced, before the retractation, it could not be obligatory on the husband to pay the dower on demand. Therefore the property, real and personal, will not pass to the wife under the deed in question, but she

is entitled to the specific sum settled on her as dower.*

CASE XXXIX.

Q. A woman brought an action against her husband to recover one-third of her dower, which was stipulated to be paid promptly, and obtained judgment for the amount claimed. She died during the life-time of her husband, and after her death her sister sued her husband for the remaining two-thirds due to her on account of dower. According to the Moohummudan Law, will such an action, brought by the sister of the deceased wife, lie against the husband, and is the husband entitled, on the death of his wife, to come in for any part of the sum specified in the deed as due to her on account of dower?

There being no other heirs of a deceased woman, her husband and sister share her dower equally.

R. The action brought by the sister of the deceased wife to recover the total two-thirds of the dower due to the latter is inadmissible, because the sister is an heir, and she can sue for the whole, only in virtue of being a legatee; and it is not allowable to make a legacy in favor of an heir. But the plaintiff being sister of the deceased, is entitled to one moiety of the amount of the dower unpaid, and the remaining moiety will revert to the husband.

CASE XL.

Q. A woman sues her husband for forty thousand rupees and one gold mohur, claiming that sum as a debt due on account of dower. The evidence of the relations of both parties tends to prove that the amount

* The provision contained in the latter part of the deed was invalid, because, in all contracts of exchange certainty is requisite, and it is essential that the subject of the contract should be actually in existence at the time, or susceptible of delivery at some future definite period. See Prin: Sale 13 and 14.

above-mentioned is due, and it is also established, by the evidence of the same description of persons, that it never has been usual to stipulate for less dower on the occasion of the marriage of the female relations of either party. The defendant however declares the amount of dower to have been fixed at the lowest legal standard of ten *dirms,* and he has adduced the evidence of strangers to prove his assertion. Under these circumstances, is the allegation of the wife to be preferred, or is the assertion of the husband entitled to superior regard?

In a dispute relative to the amount of dower, the evidence adduced by the wife is preferable to that of the husband, provided her proper dower falls short of the amount claimed, but not otherwise.

R. Under the circumstances above stated, the allegation of the wife is to be preferred, agreeably to the doctrine contained in the *Hidaya,*—"In a case where a dispute arises between the husband and wife concerning the amount of the dower on the continuance of the marriage, let us suppose that the husband declares one thousand *dirms* for instance, and the wife claims two thousand, whoever of the two produces evidence in support of his or her declaration, the same is to be credited; and, if they both produce evidence, the evidence on the part of the wife is to be credited; because, by such evidence her right to the excess is established." So also in the *Tatar Khaneea,*—"Should each party produce evidence, that which proves the most is the more weighty and preferable." In case of a dispute relative to a claim of dower, it is incumbent on the judge to award the proper dower; that is a sum proportionable to the rank and circumstances of the wife; as is laid down in the *Aulumgeeree,*—"Where a husband and wife dispute as to the amount of dower, the judge should award proper dower." In a suit relative to matters connected with marriage, a preference should be given to the evidence of relations over that of strangers; as is laid down in the *Hummadee,*—"The

Proper dower should be awarded where there is no evidence to prove the amount.

evidence of the families of the parties is preferable to that of strangers, in a case of marriage."*

CASE XLI.

Q. A person says to his wife "you are not my wife," and she in reply says "you are not my husband." The parties however live together until the death of the husband. Do these words amount to a divorce, and

* The cause in which the above opinion was given, having been appealed to the Court of *Sudder Dewanee Adawlut*, the Law Officers of that Court were required to state, after a perusal of the proceedings, whether there was sufficient evidence to prove the alleged divorce; and if so, whether the sum claimed was actually due from the husband, and generally whether the exposition of the Law, as given in the Provincial Court of Patna, was correct. To this reference the *Kazee* and *Mooftees* replied that the divorce was fully proved, and that judging from the evidence in favor of the wife only, the sum claimed by her would appear to be due from the husband. With respect to the general accuracy of the *Futwa* delivered in the Court below, they observed that the opinion therein contained, that the evidence of the wife should be preferred in cases where each party adduces evidence, though entertained by some lawyers, is nevertheless not the accurate or prevailing opinion; and that it is not sanctioned by the commentator on the *Viqaya*, or by the compiler of the *Hidaya*. As to the passage cited from the *Hummadee*, they declared their inability to find it in that work. It may seem strange that the *Futwa* delivered in the Provincial Court was signed by no less than five *Mooftees*, and that they should have misquoted the *Hidaya* in so extraordinary a manner. The Law is not that the evidence of the wife is to be preferred to that of the husband in all cases; but only in case her proper dower (that is the amount usually paid as dower to females of the same family) falls short of the amount claimed by her. The following is a correct extract from the *Hidaya*. The part in Italics was omitted in the quotation of the *Mooftees*,—"In a case where a dispute arises between the husband and wife concerning the amount of the dower on the continuance of the marriage, let us suppose that the husband declares one thousand *dirms* for instance and the wife claims two thousand; *in which case, if the proper dower of the woman do not exceed one thousand, the declaration of the husband is to be credited; but if it be two thousand or upwards, that of the wife; and* whoever of the two produces evidence in support of his or her declaration, the same is to be credited, *under either of the above circumstances;* and if they both produce evidence, *under the first of the above circumstances, that is the woman's proper dower not exceeding one thousand dirms,* the evidence on the part of the wife is to be credited, because by such evidence her right to the excess is established."

The principle on which the Law proceeds is as follows:—If the proper dower of a woman equal or exceed the amount of her claim, and neither party have evidence, her allegation is to be credited, because, *primâ facie*, it is more probable; but if, under such circumstances, both parties have evidence, that adduced by the husband should be preferred, because the object of evidence is to establish some matter which is not *primâ facie* apparent.

are they sufficient to exclude the wife from the inheritance or not?

Of divorce.

R. Under the above circumstances, the widow can not be debarred from inheriting her husband's estate, because such a declaration does not amount to divorce, so as to exclude from inheritance. It is laid down in the *Futawa-i-Aulumgeeree* and other books of Law,—" If a man say to his wife " you are not my wife," by such declaration no divorce will take place, even although such was the intention of the husband, and this opinion is universally received."

CASE XLII.

Q. A person on the 20th of *Suffur* in the year 1232, *Hijree*, (corresponding with the 7th *Pous* of 1224, B. S.) declared that he had repudiated his wife by three divorces, agreeably to the rules of the Moohummudan Law, from the year 1178 or upwards of forty-six years back. In this case, from what date should the divorce be held to take effect?

A divorce cannot be referred back to an antecedent period.

R. Under the above circumstances, if the wife deny the fact of her having been divorced by the husband, the divorce, according to Law, should be held to take effect from the date on which it was declared; as is laid down in the *Shurhi Viqaya*,—" If a person say to his wife, whom he married previously to the day to which he referred the divorce " you are divorced yesterday," and she deny it, the divorce takes effect only from the moment of its being declared."

CASE XLIII.

Q. A man of credit and respectability had two wives, by each of whom he had children. On his death the friends of the children of one of his wives declare that

the other was not married to him, but merely entertained by him as a servant. Owing to the length of time which has intervened, the fact of the marriage cannot be fully substantiated. Under these circumstances, what should be considered sufficient proof to establish the marriage?

The parentage of the off-spring of a free woman having been acknowledged, is sufficient evidence of her marriage with the acknowledger.

R. If the person representing herself as the wife of the deceased, (whose marriage with him, owing to lapse of time, cannot be proved, and who is declared by the opposite party not to have been married to him, but merely entertained as a servant) is a free woman, and not a slave, and the deceased should have acknowledged the parentage of her offspring, such acknowledgment on his part is sufficient evidence of the marriage, but it is not sufficient evidence on which to establish a claim of dower, as is stated in the *Ashbah-o-nuzayir*,—"An acknowledgment of parentage is an acknowledgment of marriage, but not of dower." In this case, though there is no evidence to the nuptials, there is the acknowledgment of the father as to the parentage of the child, which is sufficient proof of marriage.*

CASE XLIV.

Q. A woman having been divorced by her husband, lodges a complaint against him, claiming the sum of six rupees and twelve annas as her alimony for the time of *Edit* or term of probation, being three months and thirteen days. After the divorce, according to the Moohummudan Law, has she any right to obtain maintenance from her husband for the time of *Edit* or term of probation? and how many months and days are fixed as the period of *Edit* or term of probation?

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* This is going beyond the maxim that "*Pater est quem nuptiæ demonstrant;*" for in this case the nuptials are indicated by the father, and not the father by the nuptials.

Term of probation after divorce.

R. According to Law, the *Edit* or term of probation of a woman arrived at the age of puberty, and divorced from her husband, extends until three successive menstruations have occurred. It is laid down in the *Viqaya*,—"The time of *Edit* or term of probation allowed to a free woman is that occupied in three successive menstruations." "The *Edit* of a woman, who, on account of extreme youth or age, is not subject to the menstrual discharge is three months." "The *Edit* of a pregnant woman is accomplished by her delivery." So also the same authority,—"The *Edit* of a pregnant woman continues until she be delivered of a child either dead or living." It is incumbent on the husband to defray the expences of his divorced wife on account of food, raiment and habitation until the time of *Edit* or term of probation be expired. As is declared in the *Shurhi Viqaya*,—"To a woman reversibly and to one irreversibly divorced, and to one whose separation from her husband originated from no circumstance which can be imputed to her as a crime, as in a case of option of puberty or manumission, or of a separation demanded by her on account of inequality, maintenance and a habitation should be assigned."

Alimony claimable during the term.

CASE XLV.

Q. To which of the parents does a bastard child belong, and to which of them should the charge of it be confided, when they each separately claim it?

A bastard child is *filius nullius*, but the mother has a right to it until seven years old.

R. A bastard child belongs, legally speaking, to neither of its parents, and it is in every sense of the word *filius nullius*; but for the purpose of securing its due nourishment and support, it should, until it has attained the age of seven years, be left in charge of the mother. After that age it may make its own election with which

of the parents it will reside, or it may live apart from them altogether, if so inclined.*

CASE XLVI.

Q. A woman lived, for a considerable time, in a state of cohabitation with a man, but it is not clearly proved, that she was married to him. Afterwards disagreeing, they separated. The parties are now disputing about the right to several daughters, who were the fruits of their intercourse. To which of them does the possession of the daughters belong according to Law?

Legitimacy how presumable.

R. If the man declare, that the daughters are his offspring, such declaration must be upheld as conclusive, provided that the woman has apparently no other husband; because the fact of parentage may be determined by declaration. The maintenance of the daughters is incumbent on the father, but not on the mother. Those daughters are free, and cannot therefore be considered in the light of slaves. It follows, as a consequence, that marriage must be presumed, to guard against the supposition of fornication. If the man however confess, that the daughters are the fruits of fornication, there will be no legal relation between him and them, nor will their maintenance be incumbent on him.†

CASE XLVII.

Q. Supposing A not to have acknowledged, during his life-time, the parentage of B and C, begotten on

* This corresponds exactly with the provisions of the English Law on the same subject, according to which a bastard until it attain the age of seven years cannot be separated from its mother. The Moohummudan Law, however, in this particular does not apply this rule exclusively to bastards, but generally to all children, whether legitimate or illegitimate.

† The extreme tenderness of the Law with regard to children is such, that it will never suppose them to be illegitimate, so long as it is *possible* to suppose that their parents were lawfully married.

his slave girl, and not to have performed the ceremony of *numukchushee,** have B and C a legal right to inherit the property left by the deceased A, notwithstanding the omission?

Parentage of children, under what circumstances established without acknowledgment.

R. Although it does not appear that A made any direct acknowledgment of parentage, yet B and C have a legal right to inherit the property left by him, because it has been established by witnesses, that they are the sons of a woman (called a slave) who was living in a state of cohabitation with A. From these and other circumstances of the case, such as outward appearances and notoriety, it is established, that B and C were the sons of A, and that their mother was married to him. The witnesses, who negatived the marriage, obviously intended to assert, that they had no ocular knowledge of the fact, not an absolute denial of its having occurred, to assert which, would be a palpable and malicious falsehood. Besides it is not allowable to impute fornication to a Moosulmaun. The absence of ocular knowledge is not detrimental, in the case of evidence founded on notoriety. Had the witnesses possessed ocular knowledge, they would not have deposed to the notoriety of the fact. In the evidence there is no direct proof that the deceased did not acknowledge the parentage, and admitting that there was evidence to that effect, it would not be prejudicial, because the popular meaning of the term "*slave,*" as used in India, is a nominal slave, that is to say, a person really free, who is hired or purchased, and is therefore designated a male or female slave; and to establish the parentage of the offspring of such slave girl, claim and acknowledgment are not ne-

* This is an usual ceremony performed by Moohummudans, consisting, as the name imports, in causing the children to taste salt. It seems to be a superstitious practice, and is apparently borrowed from the *annaprasuna* of the Hindoos.

cessary. It is admitted, that to establish the parentage of the offspring of legal slave girls, claim and acknowledgment are necessary, but, in legal strictness, slavery has been almost extinct in this country, for a series of generations. The expression "unmarried," (used by some of the witnesses) affords presumption, that the woman was the nominal slave of the deceased, because legal slave girls cannot be married by their masters. The ceremony of *numukchushee* is not legally insisted on, so as that by its omission, the parentage would be set aside. The authority for the above opinion is an extract from the *Kholasut-ool Mooftieen,*—"Generally speaking, hearsay evidence is not admissible, except in four cases. Regarding death, or descent, or marriage, or with respect to a *Kazee.* To instance this in a case of descent, when a person hears from others, that such a one is the son of such a one, it is competent to him to give his evidence to that effect, although he may not have witnessed the birth in that person's family; in the same manner as we at this day testify, that *Aboo Bucr* (on whom be the mercy of God) was the son of *Quhafa,* although we never saw *Quhafa.* To instance marriage, when a man sees another living in a state of cohabitation with a woman, and it is rumoured that she is his wife, it is competent to him to give evidence, that the woman is the wife of that person, although he may not have been present when the marriage was contracted. And when persons give evidence, under such circumstances, declaring that they are not eye witnesses to the fact, but that it is notorious, their testimony will be received as valid." Such also is the doctrine contained in the *Hidaya,*—"It is not allowable for witnesses to depose to any thing, which they have not seen, except in cases of descent, marriage, death, jurisdiction of a *Kazee,* and sexual intercourse. It is competent to a person to depose

Authorities for the admissibility of hearsay evidence in cases of marriage and other instances.

to a fact, which may have been communicated to him by another, in whom he has confidence. This proceeds upon a favorable construction. Thus for instance, a person sees a man and woman living in the same house, and cohabiting with each other after the manner of husband and wife. In such case he may depose to the marriage." The same doctrine is maintained in the *Moheet-oo Surukhsee, Munnih-ool Ghuffar, Buhroorayiq* and other standard authorities.*

CASE XLVIII.

Q. A person disinherited his son, and afterwards being on his death-bed, repudiated his wife, the mother

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* The above opinion was delivered by the *Kuzee-ool Koozat*; but the first *Mooftee*, *Moohummud Rashid*, disagreed with him in opinion, maintaining, that the parentage was not established, and that B and C had no right of inheritance to the property left by A. His argument was, that there are two descriptions of slaves, the one nominal and the other legal, and that supposing the mother of B and C to have been of the former description, that is to say, a nominal slave or really free, in order to establish the parentage, it was necessary to prove a marriage. If on the other hand, they were legal slaves, the acknowledgment of parentage by A was necessary to prove their descent. On further reference to other Moosulmaun doctors, the opinions were nearly equally divided; but after all, the difference of opinion merely originated in a different estimate of the evidence, and not on a point of Law. There can be no doubt of the accuracy of *Moohummud Rashid's* opinion, supposing the evidence not to amount to proof of marriage; but it is equally certain, that the other was the correct opinion, supposing the evidence to have afforded such proof. Cohabitation and notoriety afford sufficient presumption, and hearsay evidence is admissible in such cases. Vide the Chapter on Evidence, Hamilton's Translation of the *Hidaya*, vol. I page 677. The Court therefore decided in favor of the sons, the nature of the evidence being deemed sufficient to establish their descent. But three points of Law were settled in this case. First,—That a marriage may be proved by something short of ocular proof, such as continual cohabitation, notoriety, hearsay or circumstantial evidence. Secondly,—That where a woman is really and legally the slave of a man (that is to say, has been captured in an infidel country, or is a descendant of such captive), her master cannot marry her; and to establish his parentage to the children begotten on such woman, he must claim and acknowledge them. Thirdly,—That where a woman is merely the nominal slave of a man (that is to say, has been sold, or hired to the person with whom she resides, which condition is not recognized by law as slavery), her master can marry her; and where there is circumstantial evidence to presume matrimony, the offspring will be legitimate, without claim or acknowledgment on the part of the father.

of the son, by divorce. Are the disinheriting and divorce in such case legal, and has the divorced widow any right to inherit the estate of the deceased?

Denial of parentage when available.

R. If a person deny the parentage of a child at the time of its birth, and when he receives the congratulations usual on the occasion, such denial, according to the Moohummudan Law, is available, and if he disown him after the time already specified, his disowning is of no effect in Law; as is laid down in the *Viqaya*,—"If a man deny the parentage of a son at the time of his birth, or at the ceremony usual at the nativity, his denial is effectual, otherwise not; and in such cases the husband and wife should both be subjected to *laân* or imprecation."* If a man divorce his wife, being in health at the time, divorce is legal and valid, and the divorced wife has no right to inherit the property of her husband; but if the husband, being on his death-bed, repudiate his wife by an irreversible divorce, and he die before the expiration of the period of her *edit* or term of probation,† the divorce is good, but she has a right to inherit: if on the other hand, he survive her term of probation, she is excluded from the inheritance. It is declared in the *Futawa Nukshbundee*,—"If a person, being on his death-bed, repudiate his wife by an irreversible divorce, and he die before the expiration of the term of probation, she will inherit from him, but if he die after the conclusion of the term, she will be excluded from the heritage."

Of death-bed divorce.

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* *Laân*, in the language of the Law, signifies testimony confirmed by oath, on the part of the husband and wife (where the testimony is strengthened by an imprecation of the curse of God on the part of the husband, and of the wrath of God on the part of the wife), in case of the former accusing the latter of adultery. See *Hidaya*, vol. I, page 344.

† The time of probation which a divorced woman is to wait before she can engage in a second marriage, in order to determine whether or not she be pregnant by the former. See *Hidaya*, vol. I, page 83.

CHAPTER VII.

PRECEDENTS OF GUARDIANS AND MINORITY.

CASE I.

Q. A person transfers by gift the whole of his property to his wife and minor children. On the death of the wife, her brother lays claim to the charge of the persons and property of the minors, in virtue of a nomination to that effect in the will of the original proprietor, and likewise by the appointment of his sister. The brother of the original proprietor also puts in the same claim, in virtue of his being next of kin. In this case, to which of the two persons above-specified does the right of guardianship legally attach?

Guardians for the marriage of minors.

R. In Law, guardianship over minors is of two descriptions: the one is for the purpose of matrimony, the other for the care of the property. The right of guardianship, for the purpose of matrimony, attaches to the paternal kindred; according to the *Viqaya,*—"The paternal relation is the guardian, according to his proximity in point of inheritance." The care of the property legally devolves, first on the father and his executor, next on the paternal grandfather and his executor, next the right of nomination rests in the ruling power and its administrator: that is to say, any person whom the government may please to appoint to the custody of the infant's property is a legal guardian; according to the authority above quoted,—"First, his father, or the executor of the father, is his guardian, then the paternal grand-father or his executor, then the magistrate or his executor." The mother, and the paternal uncle, and the maternal uncle, have no legal title to the guardianship of the property of the minors, as

And for their property.

they do not come within the class of persons above enumerated. The alledged appointment by the mother is nugatory, because, having no right of guardianship herself, she cannot convey such right to another. If the alledged appointment of the maternal uncle, in the will of the original proprietor, be proved by competent witnesses, he will be legally entitled to the guardianship of the minors. If not proved, it will remain with the ruling power to nominate a guardian.*

CASE II.

Q. A and B are joint proprietors of certain property with C, a minor, the latter having an equal interest with his uncle A, who was duly appointed his guardian. These two persons, that is to say, A the uncle, and, through him B his wife, act the part of guardians and manage all the pecuniary concerns of the minor. By some means they contrived to sell a portion of the minor's property to a third person, and still persist in maintaining the validity of the sale, on the plea of their having the entire management of the person and property of the minor. Under these circumstances, is such sale valid and maintainable by the vendors, in virtue of the deed of sale having been regularly signed, sealed and duly attested by others?

Sale of minor's landed property.

R. If the joint property of A, B and C was real, that is to say, consisted of lands, the sale by A and B of C's portion is illegal, notwithstanding the fact of their having the care of his person and property, unless under certain circumstances; unless the minor's share can be sold for double its value, unless there are no means of supporting him without having recourse to a sale of his property, unless the lands be in imminent

* See Prin: Guard: 5, 6, 7 and 10.

danger of being lost, or unless with a view to save the minor's property from usurpation, or unless some similar emergency exist. If A and B, under such circumstances, sold the minor's share in the lands, the sale will be valid and binding. If, on the other hand, the joint property was not real, but personal, A and B have no right to dispose of the minor's share, if he thereby sustain any loss, or if it be an equal chance whether profit or loss will accrue. But if by the transaction it be manifest that C must gain clear profit, it is allowable for A and B to sell his share. The principle of the Law is, that it is allowable for a guardian, executor, or any one who has the care of the person and property of a minor, to enter into a contract on his behalf where the profit must be clear and certain; for instance, they may always accept a gift on his behalf. In the case of a contract where there is a possibility of loss, it has been held that a near guardian (by which is meant a father or grandfather or guardians duly appointed by them) is at liberty to enter into it, but that a remote guardian, such as an uncle or a brother, is not at liberty to enter into such contract on behalf of the minor. Where, however, nothing but loss can accrue to the minor, such as in case of making a donation or granting a loan, it is not legal for any guardian, near or remote, or for any executor or other person under whose care he is, to act on his behalf.*

And of his personal property.

Powers of guardians in general.

CASE III.

Q. Aperson dies, leaving a son aged three years, a daughter at the breast, a widow (the mother of the children) and a half-brother. Under these circumstances, who is legally entitled to the care of the persons of the minors, and, after the widow's claim of dower

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* See Prin: Guard: &c. 14 and 15.

has been satisfied, who has the right of exercising the functions of trustee and manager of their property?

R. The mother is entitled to the care of her infant children if she continue single, but she forfeits this right immediately on her contracting a second marriage. If, however, within the period of the infancy of the children, a separation should take place between her and her second husband by divorce or other means, the right reverts to her, because the objection to her having the charge of the infants is thereby removed. But by the marriage of the mother with a near relation of the infants, such as their paternal uncle, her right to retain charge of them is not forfeited. This being the Law, therefore, if the mother of the infants should not have contracted a marriage with some stranger, she is entitled to the care of the son until he attain the age of seven years; this being the age fixed upon at which a boy is so far independent as to be able to perform, without assistance, those acts which are absolutely necessary. When he shall have become so far independent, that is to say, when he shall have attained the above age, he must be delivered (even though force should be used in separating him from the mother) to his natural or appointed guardian, because to them belongs the duty of education. The daughter should be left under charge of the mother until she manifest natural signs of puberty.*

Mother's right of guardianship, lapses by her second marriage.

Except with a near relation.

Her right over sons when ceases.

And over daughters.

CASE IV.

Q. Is a person legally competent to commit the guardianship of his infant daughter to his wife, who is the mother of the infant?

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* See Print: Guard &c. 8 and 9.

The mother of an infant may be appointed its guardian.

R. A person is legally competent to commit the guardianship of his infant daughter to the mother of such infant, she being his wife. This doctrine is upheld by various authorities, especially by the *Hidaya,* in the chapter treating of gifts.*

CASE V.

Q. 1. A lease being in every other respect conformable to the provisions of the Moohummudan Law, must it be set aside merely on the ground of its being granted in perpetuity or of the death of the lessor, and of his successor who confirmed the grant?

The non-specification of a term or the death of either of the contracting parties is sufficient to set aside a lease.

R. 1. Although the lease may have been in every other respect conformable to the provisions of the Moohummudan Law, yet the fact of its having been granted in perpetuity and the death of the lessor are each, separately, sufficient to set it aside; because, in all leases, the specification of a term is an essential condition of the contract and the existence of both of the contracting parties, until the expiration of the term it indispensable to its continuance.

Q. 2. Supposing that the lease was for a limited period, that it was otherwise valid, that the successor of the original lessor confirmed the lease in a formal manner and made mention of it in a deed of gift which he executed in favour of his six sons and the parties in this cause, that the lessee (being the minor son of the lessor) was registered as farmer during the life-time of the lessor, that the lessor during his life-time mana-

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* Had there been no appointment, the mother would have been entitled to the custody only of her child until its attaining a certain age (See Prin: Guard: and Min: 8.) The doctrine laid down in this case merely tends to establish the fact that the mother is equally eligible with others to be nominated guardian.

ged the farm for his minor son, and that, after his death, and during the minority of the lessee, his cousin acted as manager on behalf of the minor, who, on his coming of age, took possession of the farm himself, conforming to all the conditions of the contract; under these circumstances is the lease good and valid?

R. 2. Supposing the contract to be in all other respects good and valid, as stated in the foregoing question, it should be upheld under the circumstances therein set forth, the successor of the lessor having confirmed the contract, and the farm having been managed by the minor's guardian, notwithstanding the fact of the minority of the lessee.

Though the lessee be a minor a lease is good.

Q. 3. The gift in favour of a minor is perfected by the seizin of his father or other guardian. Is the seizin of a guardian of a minor farmer on the same principle sufficient to establish the validity of the lease? and is the consent of the minor to the conditions of the contract, after his coming of age, sufficient to uphold it as valid and binding?

R. 3. As the seizin of a father or of a guardian is sufficient to perfect a gift in favour of a minor, so a similar seizin is sufficient in the case of a lease, unless there may be some conditions in the contract pre. judicial to the interests of the minor, such as a stipulation for the payment of the rents, notwithstanding any injury sustained by the estate, in consequence of inundation, drought or destruction of the produce by other unavoidable accidents, in which case the minor is at liberty to object to the fulfilment of such conditions made during his minority; for a contract which was essentially void cannot subsequently be insisted on as good and valid.

Unless it involve some prejudicial conditions.

CASE VI.

Q. A person at the point of death nominated his wife and the brother of his son-in-law to the charge of the persons and property of his infant son and daughter, the former of whom was six years old, and the latter only two years old. The minor son institutes a suit against a stranger to recover some personal property. Under these circumstances, is the action instituted by the minor son maintainable in Law or not?

R. It appears from the petition presented by the wife and the brother of the son-in-law of the deceased, that he (the deceased) committed to them the care of his infant children, and made over to them his entire property in trust for the support of those children. They are therefore, according to the Moohummudan Law, executors of the deceased to all intents and purposes; as is laid down in the *Shurhi Viqaga,*—"He to whom the father has entrusted the disposal of his family and fortune is his executor." An executor duly constituted must be considered the guardian of the son; as appears from a passage in the *Viqaya,*—"The guardianship of a minor legally belongs, first to the father, next to his executor, next to the paternal grandfather." A suit instituted by two executors conjointly or by either of them separately for the right of an orphan is maintainable in Law; according to the authority already quoted,—"If a man appoint two persons as his executors, they are not entitled to act separately, except for the performance of the deceased's funeral ceremony or for the preferment of a claim to maintain his right." In the present case the action is good because both the executors concurred and supported the claim set up by the minor son.

An action may be instituted by a minor with the approbation of one of his guardians.

CHAPTER VIII.

PRECEDENTS OF SLAVERY.

CASE I.

Q. A Moosulmaun having been sent by the ruling power to subdue some rebellious Hindoos, and having obtained a victory over them, took several of their body prisoners. Among them, there was one boy of tender years, whom he made his own slave, and afterwards, having instructed him in the principles of the Moohummudan faith, he adopted him as his own son, and, in his education and other matters, he treated him with the care and consideration of a parent. Under these circumstances, can the boy so recognized as the son of the person above alluded to, be considered as his slave agreeably to Law?

Emancipation of a slave by what means implied.

R. Admitting that the boy was legally reduced to slavery (which by no means appears clearly from the question) if the Moosulmaun recognized him as his son, and declared him to be such, he will be free, even though that may not have been the intention of the person who made the declaration. If a person should say "this is my son" or "this is my daughter," emancipation follows of course, without proof of intention. The reason is, that, as the expression, in its strict sense, is not applicable, it must be taken, in its metaphorical sense, to mean emancipation; whatever may have been the intention of the person who used it. Consequently, if the Moosulmaun, in this case, not only called the boy his son, but also treated him with parental care and consideration, he must *a fortiori* be accounted free, and after his emancipation has been once established, he cannot, under any circumstances, revert to the condi-

tion of slavery. Property over mankind is terminable by emancipation, which annuls proprietary right, for, in the original creation of man, he was not intended as a fit subject of property.

CASE II.

Q. 1. What description of slaves are authorized by the Moohummudan Law?

R. 1. All men are by nature free and independent, and no man can be a subject of property, except an infidel, inhabiting a country not under the power and controul of the faithful. This right of possession, which the *Mooslims* have over *Hurbees*, (i. e. infidels fighting against the faith) is acquired by *Isteela*, which means the entire subduement of any subject of property by force of arms. The original right of property therefore, which one man may possess over another, is to be acquired solely by *Isteela* (as defined above); and cannot be obtained in the first instance, by purchase, donation or heritage. When therefore an *Imam* subdues, by force of arms, any one of the cities inhabited by infidels, such of them as may be taken prisoners become his rightful property; and he has the power of putting them to death, or making them slaves, and distributing them as such among the *Ghazees*, (i. e. victorious soldiers, particularly when fighting against infidels); or he may set them at liberty in a Moosulmaun country, and levy the capitation tax. Should he make them slaves, they become legal subjects of property, and are transferable by sale, gift or inheritance; but if, after captivity, they should become converts to the faith *(Islam)*, the power of death over them is thereby barred, though they would continue slaves; for slavery being the necessary consequence of original infidelity, the subsequent conversion to *Islam* does not affect the

prior state of bondage, to which the individual has been regularly rendered liable by *Isteela*, provided this be clearly established. From this it is evident that the same rules are applicable to slaves of both sexes. If slaves are afterwards sold or given away, by the *Imam* or by the *Ghazees* who shared at the distribution; or if they should become the property of another by inheritance; they then become slaves, under the three different classes of purchase, donation, and inheritance. If a female slave should bear offspring, by any other than by her legal lord and master, whether the father be a free-man or slave, and whether the slave of the said master or of any other person, in any of these cases, such offspring is subject to slavery; and these are called *Khanazad*, i. e. born in the family. But if the children be the avowed and acknowledged offspring of the rightful owner, they are then free, and the mother of them, (being the parent of a child by her master) becomes at his decease free also. And this rule is applicable to all their descendants to the latest posterity. The practice among free-men and women, of selling their own offspring during times of famine, is extremely improper and unjustifiable; being in direct opposition to the principles above stated; viz. that no man can be a subject of property, except an infidel taken in the act of hostilities against the faith. In no case then can a person legally free become a subject of property; and children not being the property of their parents, all sales or purchases of them, as of any other article of illegal property, are consequently invalid. It is also improper for any free-man to sell his own person, either in times of famine, or though he be oppressed by a debt which he is unable to discharge. For in the first of these cases a famished man may feed upon a dead body; or may even steal what is necessary for his support, and a distressed debtor is not liable to any fine or

Enumeration of the different modes by which slavery is created.

punishment. We are not acquainted with the principal or detailed circumstances, which led to the custom prevailing in most *Moosulmaun* countries, of purchasing and selling the inhabitants of *Ethiopia, Nubia,* and other negroes; but the ostensible causes are, either that the negroes sell their own offspring; or that *Moosulmaun* or other tribes of people take them prisoners by fraud and deceit; or seize them by stealth from the sea shores. In such cases however they are not legally slaves; and the sale and purchase of them are consequently invalid. But if a *Moosulmaun* army, by orders of an *Imam,* should invade their country, and make them prisoners of war, by force of arms, they are then legal slaves; provided, that such negroes are inhabitants of a country under the controul and government of infidels; and in which a *Moosulmaun* is not entitled to receive the full benefit and protection of his own laws. With regard to the custom prevailing in this country, of hiring children from their parents, for a very considerable period, such as for seventy or eighty years, and under this pretext making them slaves, as well as their progeny also, under the denomination of *Khanazad* (domestic slaves), the following laws are applicable: It is lawful and proper for parents to hire out their children to service; but this contract of hire becomes null and void, when the child arrives at years of discretion, as the right of paternity then ceases. A free-man, who has reached the years of discretion, may however enter into a contract to serve another, but not for any great length of time, such as for seventy years; as this also is a mere pretext, and has the same object of slavery in view; whereas the said free-man has the option of dissolving any contract of hire under either of the following circumstances:—First, It is the custom, in contracts of this nature, for a person hired on service to receive a compensation in money, clothes and food,

as the wages of hire; any day therefore that a servant receives such compensation, he is in duty bound to serve for that day; but not otherwise. Secondly, The condition of a contract of hire requires that the return of profit be agreeable to the wages of hire, and this cannot be ascertained, but by degrees and in course of time. The contract of hire therefore becomes complete or fulfilled, according to the services or benefit, actually rendered in return for the wages of hire received; and the person hired has consequently the option of dissolving the contract at any moment of the period originally agreed for. It is however unavoidable, and actually necessary, in contracts of a different nature, such as in farms of land, &c. that the lessee should not have this power. But reverting to contracts of hire for service, for a long period, and the nefarious practices of subjecting free-men to a state of bondage and slavery under this pretence, it appears expedient to provide against such abuses; and with this view, to restrict the period of service, in all contracts of hire of free-men, to a month, one year or at the utmost to three years; as in the case of a farm of endowments. It is customary also, among women who keep sets of dancing girls, to purchase female children from their parents; or by engagements directly with the children themselves. Exclusively of the illegality of such purchases, there is a further evil, resulting from this practice, which is, that the children are taught dancing and singing for others, and are also made prostitutes; both of which are extremely improper, and expressly forbidden by the Law.

Q. 2. What legal powers are the owners of slaves allowed to exercise upon the persons of their slaves; and particularly of their female slaves?

Duties on which slaves may be employed.

R. 2. The rightful proprietor of male and female slaves has a claim to the services of such slaves, to the extent of their power and ability; he may employ them in baking and cooking, in making, dying and washing clothes; as agents in mercantile transactions; in attending cattle, in tillage, or cultivation; as carpenters, ironmongers and goldsmiths; in transcribing; as weavers, and in manufacturing woollen-cloths; as shoemakers, boat-men, twisters of silk, or water-drawers; in shaving, in performing surgical operations, such as cupping; and as farmers, bricklayers, and the like: and he may hire them out on service in any of the above capacities. He may also employ them himself, or for the use of his family, in other duties of a domestic nature; such as in fetching water for washing, or purification; in anointing his body with oil, and rubbing his feet, in attending his person while dressing; and in guarding the door of his house, &c. He may also have connexion with his legal female slave; provided she is arrived at the age of maturity, and the master or proprietor has not previously given her in marriage to another.

Q. 3. What offences upon the persons of slaves, and particularly of female slaves, committed by their owners, or by others, are legally punishable, and in what manner?

R. 3. If a master oppress his slave, by employing him in any duty beyond his power and ability; such as insisting upon his carrying a load which he is incapable of bearing, or climbing a tree which he cannot accomplish, the ruling power may chastise him. It is also improper for a master to order his slave to do that which is forbidden by the Law; such as to put an innocent person to death; to set fire to a house; to

tear the clothes of another, or to commit adultery and fornication, to steal, or drink spirits, or to slander and abuse the chaste and virtuous; and if a master be guilty of such like oppressions, the ruling power may inflict on him exemplary punishment by *Tazeer* and *Akoobut*, on principles of public justice. It is further unlawful for a master to punish his male or female slaves for disrespectful conduct, and such like offences, further than by moderate correction, as the power of passing sentences of *Tazeer* and *Qisas* is solely vested in the ruling power. If therefore the master should exceed the limits of his power of chastisement above stated, he is liable to *Tazeer*. If a master should have connexion with his female slave before she has arrived at the years of maturity, and if the female slave should in consequence be seriously injured, or should die, the ruling power may punish him by *Tazeer* and *Akoobut*, on principles of public justice as before stated.

A master may be punished for maltreatment of his slave, but this is not legally a sufficient cause for emancipation.

Q. 4. Are slaves entitled to emancipation upon any and what maltreatment? and may a Court of Justice adjudge their emancipation upon proof of such maltreatment? In particular, may such judgment be passed upon proof that a female slave has, during her minority, been prostituted by her master or mistress? or that any attempt of violence has been made upon her person by her owner?

R. 4. If the master of male or female slaves should oppress or tyrannize over them, by beating them unjustly, stinting them in food, or imposing upon them duties of a difficult and oppressive nature, so as to cause them affliction and distress; or if a master should have connexion with his slave girl, before she has arrived at the years of maturity; or should give her in marriage to another, with permission to cohabit with

her, in this state; such master sins against the Divine Laws; and the ruling power may punish him by *Tadeeb* and *Tazeer* on principles of public justice; but the commission of such crimes, by the master, does not authorize the manumission of the slaves; nor has the ruling power any right, or authority, to grant them emancipation. Adverting, however, to the principle upon which the legality of slavery is originally established, (*viz.* that the subject of property must be an infidel, and taken in the act of hostility against the faith); and also to the several branches of legal slavery, arising from this principle, as by purchase, donation, inheritance, and *Khana Zadee;* whenever a case of the unlawful possession of a male or female, shall be referred to the ruling power for investigation, it is the duty of such authority to pass an order, recording the original right of freedom of such individual; to deprive the unjust proprietor of possession, and to grant immediate emancipation to the slave.

CASE III.

Q. 1. The father of Deendar Khan (the plaintiff) was a *Hindoo,* who in a year of scarcity, out of necessity, sold his son to Budun Khan and Mussummaut Asalut, to whose property Gholam Hoosein Khan (the defendant) lays claim. Does Deendar Khan by such sale legally become a slave or not?

A free-man cannot legally be sold as a slave.

R. 1. As the original state of man is freedom, no free person, whether *Hindoo* or *Moosulmaun,* can legally become a slave, from the circumstance of his having been sold in a year of scarcity, out of necessity. The contrary doctrine is maintained only by very weak authorities. That such sale does not constitute slavery, is the authentic opinion.*

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* See Prin: Slavery I.

Q. 2. According to Law, what circumstances are essential and necessary to the ceremony of emancipation?

R. 2. Words indicative of the act of emancipation are sufficient to give it effect, in whatever language expressed. It is not at all necessary, or essential, to execute a deed, or to use any formalities on the occasion.

Emancipation how effected.

CASE IV.

Q. It is a well known principle of Law that free persons cannot on any account be sold; yet it appears to be a generally received opinion that the selling and purchasing of mankind, in times of distress or difficulty, are allowable. Does the latter doctrine rest on any legal foundation?

R. Although it is doubtless the most received and authentic doctrine that, generally speaking, purchase confers no right of dominion over mankind, yet it is laid down in certain works of authority, such as the *Inaya*, the *Zukheera* and the *Moheet*, as a tradition of *Imam Moohummud*, that a person is at liberty to sell his own freedom in times of difficulty and distress, when hard pressed by his creditor.* The following is an extract from the *Inaya:*—" A person put a question to *Imam Moohummud*, requesting his opinion as to the sale of the liberty of a free-man, when perishing from famine. He replied, that under the circumstances stated, the sale is allowable; otherwise not.—A second question was put to him as to the right of concubinage, possessed by the purchaser of a woman under such

* The doctrine here maintained seems to conform to that of the Civil Law,—" Slavery was created thirdly by sale from others or themselves, for persons of above twenty years of age might sell *themselves* to slavery."—*Brown's Civil Law, vol.* 1, *page* 57.

circumstances; he answered, that it is lawful, and that the parentage of the child begotten on her is established in the purchaser, and so likewise if such purchaser had sold her to a third person." It is laid down in the *Zukheera*,—" A free person is competent of his own will and accord to sell his own liberty, at a time when he is in pecuniary difficulties and his creditor demands payment, having recourse to violent or compulsory measures." It is also written in the *Moheet*,—" It is not lawful for a man to sell his liberty except when he has no other means of discharging a debt which he owes, or except when he is reduced to such distress as to make it necessary for the preservation of his life, or except in a time of famine, when from extreme hunger he would eat carrion or human flesh; to avoid which it is better that a man should sell himself into slavery. From this cause people sold their liberties in the time of Joseph." According to the foregoing authorities contained in the *Moheet* and the *Zukheera*, and the traditionary doctrine of Imam Moohummud cited in the *Inaya*, it is generally admitted that free-men are competent to dispose of their own liberties by sale, in cases of extreme distress.*

It is lawful for a free-man to sell his own liberty in a case of extreme distress.

CASE. V.

Q. Does the estate of Inayut Oollah go to the widow of Wasil Beg, who was educated by the deceased proprietor?

No descripti-on of slave can inherit property.

R. It appears that Wasil Beg was not the son of the deceased proprietor but merely an *elevè* of his, without any tie of relationship, and was purchased by him for a sum of money. The estate left therefore by the deceased proprietor, according to Law, does not devolve

* See Prin: Slavery 17.

on the widow of Wasil Beg. In the *Mujma-ool Burkaut*, treating of impediments to succession, it is stated,—"Slavery is an impediment to inheritance; and there is no difference in this respect whether the claimant be a pure slave, totally destitute of any thing approaching to freedom, or whether he may have been partially emancipated, such as a privileged or licensed slave, or the mother of offspring, nor according to *Aboo Haneefa* one emancipated by his half-owner."*

CASE VI.

Q. A prostitute hires the daughter of another woman, as a slave, for the sum of twenty rupees, and causes her to follow the same line of life as herself. Is such transaction lawful?

An infant being hired as a slave by his parents during his infancy, may recover his liberty on attaining the age of puberty.

R. According to Law, the transaction (as appears on the face of the deed) is not allowable, because the authority of parents over their children is restricted to the age of childhood, and after they attain puberty the parents have no authority to dispose of their persons or property; but, in the present instance, it seems that the mother let out to hire her child, while only six years old, in slavery, for the term of ninety-five years. Now after the age of puberty (the extremest verge of which is fifteen years according to Law) parents have no right of disposal, as affecting their children. This hiring therefore for the term of ninety-five years cannot, under such circumstances, be admissible. It has been declared in works of authority, that if a person has been let to hire by his parents during his childhood, he is at liberty, on attaining the age of puberty, either to continue in service or to annul the contract entered into

* The question in this case supposes that the slave was such in the strict and legal acceptation of the term. For the disqualifications attendant on the state of slavery. See Prin: Slav: 11.

by his parents, by emancipating himself from bondage. Besides the life of a prostitute is exceedingly reprehensible, and it can never be tolerated that a person of this description should hire another to make her follow the same pursuits. The authorities for the above doctrine are as follow:—Extract from the *Tuhzeeb* cited in the *Futawai Ibrahim Shahee*,—"It is allowable for a father, a grand-father or for mothers to let out to hire an infant, but when it attains puberty, it may either affirm or annul the contract." So also an extract from the twenty-third chapter of the *Yunbooa*, a commentary on *Tuhavee* cited in the *Ibrahim Shahee*, at the conclusion of the chapter on guardians,—"When an infant shall (be able to) understand the period of a lease, it is optional with him to confirm or to annul it, provided it affects his person, but, if it affects his property only, it is not optional with him to set it aside, nor can he rescind a contract of sale entered into during his minority."*

CASE. VII.

Q. A person has a family by his wife, and also a family by one or two concubines, to whom he was not married. These concubines were slave girls, but it is not clear whether they were the property of the person in question, or of another. The question is, can the issue of those concubines inherit the property of their father on his death?

Children begotten on the unmarried slave of another are illegitimate and belong to her proprietor.

R. Children born of a concubine, who was the slave of another, and to whom the father was not married, are not entitled to inherit his property; and the reason is, that, being the fruit of fornication, their parentage cannot be established in that person, and secondly, be-

* This of course implies that the persons who entered into the contract on his behalf were his legal guardians.

case, leaving fornication out of the question, the children begotten on the slave girl of another person are the property of her master, and this being the case, they can have no claim to the property, because slavery is one bar to inheritance. If the concubine were the property of the father, and either she or her mother had been made captive in an infidel country, and had been duly subjected to slavery, the connection without marriage is legal, and the parentage of her offspring would vest in the father, if he claimed them, and after his death they would be entitled to a portion of inheritance. But if she had not been duly subjected to slavery by being made captive in an infidel country, as above described, such concubine is not a slave in the legal sense of the term, and connexion with her is unlawful, without marriage; nor will the parentage of her offspring be established in the father, because it is a requisite condition in the establishment of parentage that there should be a *consort;* and consorts are either principal or inferior. A wife is of the first description, the parentage of whose offspring is established in the husband independently of any claim on his part, and cannot be disavowed by his denial. A slave is of the other description, the parentage of whose offspring is not established in the father without claim. The right of inheritance depends on the establishment of parentage; consequently the children of such concubines are not heirs.

But begotten on the unmarried slave of the father are legitimate.

CASE VIII.

Q. The slave girl of a *Moosulmaun* (the right to whom he had acquired by inheritance) married the slave of another person, and both the wife and husband took up their abode in the house of the proprietor of the female slave, where she brought forth children in consequence of the matrimonial intercourse. The pro-

prietor of the male slave superintended the marriage ceremony and defrayed all the expences attendant on the occasion, inclusive of the usual donations presented to the bride's mother. Under these circumstances, whether is the proprietor of the female slave or of the male slave entitled to the proprietary right in the issue of the marriage? Has the mother of the female slave any right to take pecuniary donations and to contract her daughter in marriage, she herself being the slave of the person who is proprietor of her daughter?

The issue of a married male and female slave belongs to the proprietor of the latter.

R. Under the above circumstances, the mother of the slave girl was not entitled to receive any pecuniary donation in consideration of her daughter's marriage, or to dispose of her in marriage. The contract, to be complete and binding, must have the approbation of the proprietor of the female slave, but his consent is inferred, as on receiving intelligence of the marriage, he did not oppose it in any manner or object to its consummation. The proprietor of the slave girl has the absolute right to the issue of the marriage, and the master of the male slave can prefer no legal claim.*

CASE IX.

Q. 1. According to the *Moohummudan* Law, if a child is born of a female slave, purchased by her proprietor, is such child the property of the mother, or of her master?

Of the issue of female slaves in general.

R. 1. According to the *Moohummudan* Law, the term slave signifies a person who has become the property of a *Mooslim* by capture in an hostile country, or descendants from such captives. Children born of such women are the property of their masters. It is stated

* See Prin: Slavery 16.

in the *Shurhi Viqaya, Hidaya* and other authorities,—"The embryo follows the mother both in slavery and emancipation."

Q. 2. Is it lawful to dispose of by sale, or to deposit as a pledge any human being?

Sale or pledge of a free-man.

R. 2. No human being who is in a state of freedom can be a fit subject of sale or deposit; according to the *Shurhi Viqaya*,—"The sale of a free-man is void. To deposit as a pledge a free-man is an invalid act."

CASE X.

Q. A free-woman having attained the age of majority, that is to say, being fifteen years old, voluntarily, and by her own choice, contracts matrimony with a slave, and they live in the same house together, as husband and wife, for the space of a year and a half. Can such marriage of a free-woman with a slave, be considered a legal and valid contract?

Of the marriage of free-women with slaves.

R. The marriage of a free-woman with a slave is legal and valid. This opinion is in conformity with the doctrine maintained in the *Qoodooree*,—"When a slave, by the consent of his master, marries a free-woman, he is responsible for her claim of dower, and he may be sold in satisfaction thereof."*

CASE XI.

Q. A woman of the *Hindoo* persuasion resides in the house of a *Moosulmaun* and becomes a convert to the faith of *Moohummud*. After such conversion she takes up her abode with a *Rajpoot*, lives with him as

* See Prin: Slavery 14. But the offspring of such marriage are slaves and belong to the master of the husband.

his concubine, and has by him a daughter, who is living, as are also both her parents. Under these circumstances, to which of the parents does the daughter belong? If the daughter belongs to the *Rajpoot*, is he entitled to sell her to another or not? If he is entitled to do so, can the purchaser of her, dispose of her to another by sale; and if, during her minority, she lives with the purchaser, is she, on her attaining the age of maturity, at liberty to free herself from slavery or not? According to the *Moohummudan* Law, what sort of slaves are fit subjects of purchase and sale?

The parents of an illegitimate child have no right to sell it into slavery.

R. The daughter having been born in a state of freedom, her parents are not proprietors of her, but the mother is entitled to the charge of her person until she attain the age of puberty. Neither of the parents is permitted to sell such child, and whosoever purchased it, the purchase is null and void; as mankind is originally free and is not a fit subject of slavery, except in a case of *Isteela*, which obtains when a *Moohummudan* ruler subdues the dominion of infidels and makes captives of its inhabitants, both male and female. If they become converts to the *Moohummudan* religion, their lives should be spared, but they will continue in a state of slavery in consideration of their original infidelity. In this case the ruling power is invested with authority to dispose of them by sale or gift. According to the *Moohummudan* Law, therefore, slavery can originate in one way only, namely, by *Isteela*, as above defined; and there are three descriptions of slaves—*Mumlook* or acquired, *Mowroos* or inherited, and *Mowhoob* or given. The offspring of these three descriptions of slaves are termed *Khâněh Zad* (viz. born in the house), and they continue in a state of slavery, unless emancipated by their masters.

Of *Isteela.*

CHAPTER IX.

PRECEDENTS OF ENDOWMENTS.

CASE I.

Q. Can an individual assign, in payment of his wife's dower, lands which have been appropriated to a religious endowment? Have the partners in the property so assigned a right to claim it? and if so, is the assignment of it in dower rendered null and void? and, supposing any of the partners in the property so assigned to acquiesce in and assent to its being assigned in payment of dower, will the act of such person be good against her heir?

Endowed property cannot be inherited, sold, or assigned in dower.

R. In Law, property appropriated to an endowment, is neither a fit subject of inheritance, nor of sale, nor of dower,* because, according to the received opinion, a thing so appropriated is the property of no individual, but appertains to the Almighty. If the trustee of an endowment should have made an assignment of the nature alluded to, he should be deposed, on account of his breach of trust. The ruling authority has the power of appointment in the absence of the appropriator or his executor. The dower of a woman is a just debt; and cannot be extinguished without payment, or relinquishment on her part. As property appropriated to an endowment is not a fit subject of inheritance, a claim founded on partnership by right of inheritance is inadmissible. If any one assign property so appropriated, in payment of his wife's dower, and the trustee acquiesce in such assignment, he should be deposed, on account of his breach of trust; and after his being

And should be resumed when so disposed of, and trustee removed.

* See Prin: Endt; 2.

so deposed, the ruling power should appoint in his place another trustee, who will be competent to reclaim the lands so appropriated, which had been assigned in payment of dower.

CASE II.

Q. 1. Has a superintendent the right of selling endowed lands, for the purpose of defraying the expences attendant on the repair of the buildings of the endowment?

Sale of endowed lands by a superintendent when admissible

R. 1. Generally speaking, the gift or sale of endowed lands is illegal. It is incumbent on the superintendent to apply the profits of the lands, in the first instance, to defray the expence of repairing the buildings of the endowment, and the surplus may be applied to other purposes connected with the institution; although the person who founded the endowment may not have specified the repairing them as a condition. If the profits of the lands are not sufficient to cover the expence of necessary repairs, the trustee is at liberty to dispose of such portion of the lands as may enable him to effect this purpose, because the preservation of buildings is, in all cases of endowment, a matter of indispensable necessity.*

Q. 2. Supposing the superintendent, under pretence of applying the proceeds to the repairs of religious edifices, disposes of the endowed lands, but in reality applies the proceeds to other purposes, will such sale be upheld or set aside?

* But sale should not be resorted to so long as any other method of realizing the necessary funds may exist, and even in that case judicial authority should be obtained. This is agreeable to the opinion of *Hisaboodeen-ul Bokharee* cited in the *Futawai Hummadea*, and other works.

R. 2. The reply to the first question will show, that a sale of endowed lands made by a superintendent, for purposes other than to defray the necessary expences of repairs, is illegal. Therefore, a sale being made, and the proceeds being applied to other purposes, it will be set aside, and the superintendent should be deprived of his office, for breach of trust.*

Rule where proceeds are misappropriated.

CASE III.

Q. 1. Certain lands were conveyed by royal grant to the superior of an endowment to hold generation after generation, and the produce to be appropriated to the maintenance of himself and the religious endowment. The grantee died childless. In this case, has his mother, or have his sisters, any legal proprietary right to the lands granted as above; and if so, in what proportions?

R. 1. Royal grants are of two descriptions. The one is called *Altumgha* and is made for personal purposes. To such an estate, on the death of the grantee, the sharers and residuaries succeed to their legal portions according to the Law of Inheritance. The other is made for charitable and religious purposes and is termed *wuqf.* With respect to the latter no claims of inheritance are admissible; and, after the death of the superior, his mother and sisters have no better title to the succession in proprietary right than any other persons. In the award of shares to persons entitled to participate in the benefit of an endowment, the Law makes no distinction between males and females. A partition of the endowment itself is illegal, but a partition of the profits arising therefrom is allowable.

Of *Altumgha.*

Of *Wuqf.*

Wuqf property not partible.

But proceeds partible.

* See Prin: Endt: 2, 3, 5.

Q. 2. The superior of an endowment having obtained a royal grant of certain lands for the support of a religious and charitable institution, and for his own maintenance, died childless. On his decease, his half-brother sued his widow to recover the said lands, and obtained a judgment from the ruling authority, (not the king) that the lands should be held jointly and in equal proportions between the litigating parties, on the condition that they and their respective heirs should abstain from future dispute. In this case is such partition allowable, and if so, will it hold good during the life-time of the parceners only, or will it be binding against their heirs also?

By order of any ruling authority.

R. 2. It is lawful in the ruling power to confer on the half-brother of the deceased superintendent the possession of the lands in question, and to award a partition of the profits in favor of the widow and daughters as a charitable donation; because the ruling power is in such cases authorized to order a partition of the profits, though incompetent to direct a partition of the endowment itself.

Q. 3. After the partition above alluded to, will a gift made by the widow of her portion to her daughters be good and valid?

But gift of proceeds by grantee invalid.

R. 3. As the widow had no legal right to the property acquired by her at the partition, and could have succeeded to it only as an object of charity, her gift of such property to her daughters is illegal; besides, by so doing, it would be making a gift of profits, and a gift of profits is null and void.

Q. 4. If, after the partition as above stated, a second royal grant should issue of the same tenor as the first,

conferring possession on the son of the half-brother of the superior, will the benefit of partition and right of inheritance conferred on the widow and daughters by the intermediate award of the ruling power, be rendered inoperative and be annulled by the subsequent royal grant?

R. 4. If the second royal grant is similar in purport to the first, merely appointing a superior, without making any mention of the partition, it cannot be held to annul the intermediate award of the ruling power; because the widow and daughters of the first superior have no legal right of inheritance; the benefits to them arising out of a charitable donation, which, without some very cogent reason, it is illegal to defeat.*

And partition not annulled by the appointment of another superior.

CASE IV.

Q. 1. Moohummud Rufeeq was made superior of a certain endowment, and by the grant which conferred the office, it was declared heritable by his *furzundan* or offspring. At present the daughter of his grand-son in the male line, and the grand-son in the female line of his grand-son in the male line, are in possession of the office. Now the great-grand-son in the male line claims the office, on the plea, that the first of the two occupants is a woman, and therefore incompetent to its duties, and that the second cannot, according to Law, be enumerated among the offspring of Moohummud Rufeeq. Can therefore the grand-son in the female line of the grand-son in the male line be enumerated among

* In the original question and answer to this case, the offices of *Mootuwulee* or superintendent, and of *Sujada nisheen* or superior, seem to have been confounded, although the offices are, in point of fact, entirely distinct. See Note to? Precedents of Endt: case 9. The different offices however may have been held by the same individual, as there is nothing incompatible in their union. To avoid confusion, I have rendered the term by that of superior only, being the term made use of in the first question.

the offspring? and are females competent to the duties of such offices?

R. 1. Under such circumstances, the grand-son in the female line of the grand-son in the male line cannot be enumerated among the *furzundan* or offspring or lineal descendants of Moohummud Rufeeq; because when these terms are applied relatively to a person, they mean only those who are the lineal descendants of that person, or his descendants in the male line for three generations, and even lower: but the grand-son in the female line takes his descent from his own father, and not from Moohummud Rufeeq, as appears from the *Aulumgeeree*,—"If a person say, I have appropriated this land for the benefit of my descendants, all the generations will inherit, without regard to sex, on account of the general signification of the term "descendants," and so in the *Khizanut-ool Mooftieen*,—"If a man appropriate an estate to be enjoyed by his descendants in perpetuity, so long as the race continues, and he leave children and children of his male children, it will be divided among them equally, and no preference will be shown to the males over the female, because the appropriation declared them equally entitled. But the children of females are not reckoned among the lineal descendants according to the approved doctrine. Such also would have been the case if the property left had been a bequest, instead of an appropriation; and it has been ruled according to this doctrine, because the descendants of a man's daughters are not the lineal descendants of that man, lineage being derived from the father, not from the mother." Females are not competent to assume the office of superior of an endowment; and such an act is at variance with the usages of the country, because it is the duty of the superior to instruct and guide his disciples, to teach his scholars,

A descendant in the female line is not ranked among the *furzundan* or offspring of his ancestor.

A female cannot be superior of an endowment.

and to keep their company continually, in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded.

Q. 2. In the grant obtained by Fyazool Islam, the grand-son of Moohummud Rufeeq, it is stated that the offices of trustee, controller and superior of the endowment is continued and confirmed in him and his offspring. Under these circumstances, do his daughter and the son of his daughter fall under the denomination of offspring?

R. 2. The grant obtained by Fyazool Islam restricts the offices of superintendent, controller and superior of the endowment to him and his offspring. His daughter is enumerated among his offspring, because that is a general term, and includes both sons and daughters equally; but she is nevertheless excluded from the operation of the grant, which provides for the performance of the duties of superior, to which she is incompetent. The son of his daughter is also excluded, according to the approved doctrine, because the expression "offspring of a person" applies to the person from whom the lineage is derived, and the daughter's son does not derive his lineage from his maternal grand-father, but from his own father; as appears from the *Aulumgeeree*,—"I have appropriated this land for the benefit of my son and my son's son: the son who is the issue of his loins, and the son of his son, whether living at the time of the appropriation or born subsequently, will take possession, for they are both equal in point of right; but a descendant lower than two generations cannot participate in the possession, nor can the sons of daughters, agreeably to the approved doctrine: according to which cases are ruled." The same opinion is maintained in the *Moheet-oo Surukhsee*.

The offices of superintendent and superior being confined to a man's offspring (*furzundan*), his daughter cannot succeed, being a female, nor her son, he not being of the *furzundan*.

Q. 3. It appears that Shakir Ali Khan conferred on Moohummud Rufeeq, the spiritual care and direction, the superintendence and charge of the scholars of the institution, and indigent persons, of the endowment, together with charge of the seminary and endowment, and the dwelling-houses attached thereto; and also conferred on him the office of preacher and lecturer: and having constituted him his sole successor, vested him with plenary and absolute power therein. He also divided the appropriated funds assigned for the maintenance of himself, his descendants and family, and gave them to his son Moohummud Rufeeq and others. He, the said Moohummud Rufeeq, at his own request, obtained a grant of the offices of trustee and superior of the endowment, restricted to his own offspring; and, having assigned more than half the funds appropriated for his own maintenance, to the use of the endowment and college, and to the support of the offices of superior and superintendent, died. Under these circumstances, are the offices of superintendent and superior, legally restricted to the descendants in the male line of Moohummud Rufeeq? and can the grandson in the female line, be enumerated among the male offspring or lineal descendants of that person?

A female is competent to the office of superintendent of an endowment.

R. 3. Although it is allowable to confide the trust of a pious endowment to women, as well as to men, yet, in this case, it has been clearly ascertained, that Moohummud Rufeeq caused the offices of superior, and superintendent to be centred in his own offspring exclusively, without making any distinction. It is necessary therefore, that all the duties should be performed by one person, but it is necessary also that this person should be one of the male descendants of Moohummud Rufeeq, for, as was before mentioned, it is not customary to invest females with the office of superior of en-

dowments. The grandson in the female line cannot be enumerated among the offspring or lineal descendants of Moohummud Rufeeq, as was shewn above. Therefore, according to established usage, he, of the male offspring or lineal descendants, who is most worthy, will be entitled to succeed to the offices in question.

CASE V.

Q. The inhabitants of a certain village formed a subscription among themselves, and having collected the sum required, built a *mosque*, accompanied with suitable places of worship on the *ayma* or rent free lands, of a certain *Fakeer*. Have the builders of these edifices a right to appoint any other *Fakeer* to collect the offerings there presented, or has the *Fakeer*, on whose land the edifices were built, a right to make the collections and to exercise general superintendence? Supposing the builders to have the right of appointment, has the son of the person appointed by them, an hereditary right to succeed to the office of superintendent, on the death of his father, or have the builders in such case a right to appoint another successor. Supposing the *Fakeer* to have the right of superintendence, on whom will the office devolve on his death; on his son, or on some other person?

Case of a mosque, built without the consent of the land owner.

R. Both land and building are included in the term *mosque*. It is neither simply land nor simply building, but it comprizes both. The land is the chief part of it, because the foundation of the *mosque* stands upon it, and the superstructure is dependant on the land. Under these circumstances, without the consent of the *Fakeer*, who is the land-lord, the building cannot in the legal sense be termed a *mosque*; because no one is at liberty to erect a building on the land of another without that other's consent, and if he do so, the Law sanctions

And of the land owner's appropriating his land for the purpose.

its being razed to the ground. If the *Fakeer*, who is the land-lord, consented that the subscribers should build and endow a *mosque*, and appropriated his land for that purpose; in this case the subscribers and the *Fakeer* are participators in endowing the *mosque*, the former by contributing the building, and the latter by contributing the land. He who makes the appropriation has the patronage of appointing a superintendent; but as in this case they all unite in making the appropriation, the patronage is vested in them all collectively, not individually; and the *Fakeer* and the subscribers must unite in nominating a trustee, for the purpose of collecting the appropriations, offerings, and other profits, and applying them to the use of the endowment. If the *Fakeer* had said to the subscribers, that he was a poor man, and not able to bear the expence of erecting a *mosque*, and had requested them therefore to erect one on his ground, for his benefit, in order that he might endow a *mosque*, and the subscribers agreed to do so; in this case the building is the property of the *Fakeer*, and he alone is considered the person who makes the appropriation. The right of appointing a superintendent in such case, rests with him, and after his death, the right devolves on his heir. Under these circumstances, if the subscribers have built an edifice on the lands of the *Fakeer* without his consent, let them either present it to the *Fakeer* for the purpose of its being appropriated and endowed by him as a *mosque*, or let them raze it to the ground, because no person is at liberty to build on the land of another, as was above stated. He, who makes the appropriation, has the right to appoint a trustee, and he may appoint whomsoever he likes, and after him his heirs. Authorities; *Kazee Khan*,—"The appropriation of a superstructure without its basis is not allowable; an edifice independently of its foundation is not a *mosque*." *Shurhi Viqaya*,—"If

And of its being erected by others for the land owner's benefit.

Rule in the first case.

any one build or plant on the land of another, let the thing built or planted be razed or rooted out." *Khiza-nut-ool Mooftieen,*—"He who makes the appropriation has the patronage of the endowment; after him his executor, unless they are excluded by being or becoming profligate; in which case they will be deprived of the patronage, which will be vested elsewhere; but it will revert to them should they return to virtue, and if, after having appointed a superintendent, the founder desire to remove him, he is at liberty to do so, and assume the superintendance himself." *Hidaya,*—"If a person usurp land and build and plant thereon, he will be desired to eradicate and raze his plants or buildings. The patronage is vested in him who makes the appropriation, and after his death in his heirs."

The patronage of an endowment in whom vested.

Exception.

CASE VI.

Q. Roushun Shah, died possessed of a cemetery and an *Imambara,* leaving a son and a daughter, the defendant and the plaintiff in the present case. It appears, from the defendant's admission, that, on the death of his father, he took possession of the aforesaid property and realized the sum of one hundred and fifty rupees by permitting the performance of the rites of sepulture in the burial ground; part of which sum he laid out on buildings attached to the ground and on charitable purposes, and the remainder of which he applied to his own use. The law officers, on being before consulted, declared that *unless* the property in question had been formally appropriated as *wuqf,* the plaintiff is entitled to a third share of it; but it was not distinctly stated that she is entitled to any part of the property in dispute, or to any part of the profits realized therefrom, and if so, whether her portion is to be deducted from the gross receipts or from the net profits; the plaintiff

alleging that her consent was not obtained to the expenditure of the profits.

Cemeteries and religious buildings are inheritable, if not *wuqf*.

R. It appears that the owner of the cemetery and of the *Imambara* converted the former place into a source of personal profit, by permitting the bodies of strangers to be buried there for a pecuniary consideration, in the manner of sale or hire. Legally, therefore, such places are fit subjects of transfer and inheritance, and should devolve on all the heirs of the former proprietor. The plaintiff is further entitled to obtain her legal share of the profits, after deducting such portion as may have been actually expended in the manner stated by the defendant.*

CASE VII.

Q. Is it permissible according to Law, to make any division of the lands, or distribution of the revenues belonging to the shrine of a saint, or should they remain in the exclusive possession of the superior of the endowment?

R. If the revenues belonging to the endowment be derived from lands or other property, which admits of the realization of profits, without detriment to their source, the appropriation of them to religious purposes must be considered as intended for the consumption of their produce only: on the other hand, if they consist of other property, such as money, or food, they are held to be of the nature of pious offerings, and charitable donations. In the former description of property, the

* An erroneous opinion appears to be entertained that all property destined to religious purposes necessarily partakes of the nature of an endowment; but, in point of fact, no property should be considered as such, unless specially appropriated by the owner. It was doubtless under the erroneous impression here alluded to that the above question was put.

right over the produce only vests. In the latter, the appropriation is considered to confer an absolute right to the thing itself. Charitable donations should be distributed among the heirs of the departed saint, who have charge of the endowment, and if there be none, among the servants of the endowment. The profits also of the endowment belong of right to the heirs, and should be distributed among them, but the Laws of Inheritance do not obtain in this species of distribution. On the contrary, all the heirs take *per capita,* that is to say, the profits will be made into as many shares as there are sharers, nor will the portion of one be greater than that of another, supposing them all to be equal in knowledge and piety. This doctrine is maintained in the *Hidaya.* The offerings which people present at the shrines of departed saints belong to their heirs, and it is necessary that profits so accruing, should be distributed among them alone, and the share of one should not exceed that of another unless in a case of superior knowledge, and piety. If there are no heirs, the servants attached to the establishment have a right to the offerings; and if there be no servants, they should be distributed among necessitous Moohummudans. The Law requires, in these cases, that a trustee or superintendent should be appointed, as well to guard against any misappropriation of the proceeds, as to prevent disputes arising among those who are justly entitled to them. The authority of a superintendent or trustee is legal, supposing his nomination to have been acquiesced in by all the heirs. There is considerable difference of opinion as to the validity of an appointment which may not have been confirmed by the ruling power or by judicial authority. The author of the *Moozmirat,* in the chapter treating of appropriations, observes that all the persons entitled to participate in the profits of an appropriation should join in nominating a superinten-

Offerings made to a tomb belong to the deceased's heirs.

And in their default to the servants of the establishment.

dent or trustee, without reference to the ruling power or judicial authority; but ancient authors do not recognize the legality of such a trust. Modern authorities, however, concur in the opinion above quoted, by reason of the oppression and extortion so frequently practiced by modern rulers. It is better therefore that the whole fraternity should unite in electing a superintendent.

Superintendent by whom elected.

CASE VIII.

Q. 1. What is the meaning of the term *Mootuwulee* or trustee, and is the *Towleeut* or trust an office. If it be an office, for what purpose was it constituted, and is the possession of the trustee in virtue of proprietary right, or on what tenure does he hold the property?

R. 1. The meaning of the term *Wuqf* or appropriation, must be defined before that of *Mootuwulee* or trustee, and *Towleeut* or trust. *Wuqf* is this—a person makes an offering of his property to certain worthy objects, in order that they may derive benefit from the enjoyment of the profits thereof; and having done so, it becomes incumbent on the founder of the appropriation, in the first instance, and, secondly, on the ruling power, to appoint some particular individual to take charge of the property appropriated, and to prevent its being improperly alienated, or applied to purposes not in the contemplation of the appropriators. The officer so appointed, either by the ruling power or by the appropriator, is termed a *Nazir* and *Mootuwulee* or superintendent and trustee. From this it is evident that the *Mootuwulee* is an officer whose duty it is to attend to the due distribution of the proceeds of an endowment. *Towleeut* is the term applied to the office. Of the fact of its being an office, the legality of removal and appointment of the persons filling it furnishes sufficient proof. It is stated in the *Hidaya*, at the conclusion of

Of the office of *Mootuwulee* or Superintendent.

the chapter on appropriations, that "if an appropriator who reserves the authority to himself, be a person of infamous character and unworthy of confidence, or if he constitute another of bad character the trustee, the ruling authority may take the appropriation out of their hands." From what has preceded it is evident, that the possession of a trustee or superintendent is not in virtue of proprietary right, but merely for the purpose of securing the attainment of the objects contemplated by the founder of the appropriation. The trustee, nevertheless, if he belong to such class of persons as are entitled to participate in the benefit of the appropriation, will not be excluded from a share.

Q. 2. Several villages and bazars were appropriated to the support of the shrine of a celebrated saint and his descendants. There are twenty persons belonging to his family, of whom several have children and grandchildren; others are childless. Under these circumstances, should the profits of the villages, &c. and the offerings made to the tomb of the departed saint be divided exclusively among the twenty persons above mentioned, or should any portion be given to their families also; and if so, in what manner should the profits be distributed?

R. 2. The profits of the appropriations should be distributed equally among the twenty persons mentioned in the question. If any one of them die childless, a proportionate increase will be made in the shares of the survivors. The children of those twenty individuals will not be entitled to any portion of the profits so long as their respective ancestors survive—but, on the death of any one of the twenty persons, his family will receive such portion as the deceased received during his life-time. They will take *per stirpes* and the

Rules for apportioning the proceeds of an endowment among several grantees and their respective families.

division among themselves will be *per capita*. This doctrine is maintained in a variety of Law authorities. It is laid down in the *Khizanut-ool Mooftieen*,—" A person made an appropriation of a village, on the condition that the profits should be enjoyed by *Zeyd* and his offspring, generation after generation; in this case each branch of lineal descendants will share alike, whether consisting of one individual or of many persons; and the profits will be enjoyed by the descendants in this manner until the lineage becomes extinct, the nearer descendants continuing to exclude the more distant whose ancestors are alive; and on the death of one ancestor leaving a family, his family succeeding to the portion enjoyed by him. Where one of the sharers dies childless his portion goes to encrease the joint stock, and when the whole lineage becomes extinct, the appropriation should be devoted to the benefit of the poor." So also in the *Aulumgeeree*, in the second chapter treating of appropriation, a passage is cited from the *Mubsoot* to the following effect:—" A person makes an appropriation in favor of his lineal descendants who are ten in number; so long as those ten remain alive, they will each be entitled to an equal share. But if four of them die childless, and two die leaving children, and a dispute arise between the four survivors and the children of two of the deceased sharers, the profits of the appropriation should be made into six portions, of which the former are entitled to four and the latter to two."

Q. 3. Do the male part of the family receive a portion equal to or larger than that receivable by the female part?

R. 3. The daughters and sons are entitled to equal shares of the appropriation, provided the profits thereof

were not restricted to the male descendants. In the second chapter of the *Aulumgeeree* a passage is cited from the *Suraj-ool Wuhaj* to the following effect:—"If a man say I have appropriated this property to my male and female lineal descendants, his offspring, whether sons or daughters, will equally participate."

Male and female grantees share alike.

CASE IX.

Q. The *Guddee Nisheen* or superior* of an endowment having died, one of his *Chelas*, or disciples succeeded him in the office of superior. Is such disciple alone entitled to the whole of the estate left by the deceased, or have the other disciples also a right to interfere in the management?

R. Property belonging to an endowment is legally subject to the controul of the ruling power. It is not liable to claims of inheritance, nor can it be transferred by gift or otherwise. The appointment by the deceased of one of his disciples to be *Sujjada Nisheen*, as his successor, had allusion to religious matters and spiritual benefits, without any reference to temporal concerns. The representative of the deceased, in this instance, cannot be considered as an heir to property; for there does not exist any cause which can confer upon him a right of inheritance. If it be the pleasure of the ruling power to make the endowment a subject of inheritance,

Of succession to the office of *Sujjada nisheen* or Superior.

* I have not been able to meet with any English word exactly corresponding to the term "*Guddee Nisheen*." That which I have used appears to me to approach nearer to the meaning than any other term. The *Guddee* or *Sujjada* is the carpet on which the Moohummudans kneel in the act of prayer. The meaning of the term *Sujjada Nisheen*, which is synonimous with *Guddee Nisheen*, is thus given by Meninski: "*Considens in tapete sacras preces peracturus aliisque præiturus antistes.*" This officer is frequently confounded with the *Mootuwulee*, that is the trustee or superintendent of the endowment, although they are quite distinct; the one having charge of the spiritual, the other of the temporal affairs of the endowment. The office of trustee may be held by a woman, and the duties may be discharged by proxy; whereas the office of superior requires peculiar personal qualifications.

a new grant should be issued, in which case all the heirs will inherit in proportion to their respective shares.

CASE X.

Q. A person having been in possession, as superintendent or trustee, of a religious endowment, died, without nominating any one to succeed him in the trust. On his death his sons claim the property in question in right of inheritance. Under these circumstances, is the property a fit subject of distribution among his heirs, and if not, to whom should the care of the profits be entrusted? are all the three sons of the deceased superintendent equally entitled to claim the trust, or should it be confided to one alone?

Of succession to the office of *Mootuwulee* or Superintendent.

R. No right of inheritance can attach to the endowed property or appropriation. Consequently, the claim of inheritance preferred by the sons of the deceased is totally inadmissible. The superintendent having died, without having nominated any one of his sons to succeed him in the trust, it is competent to the ruling power or the judicial authority to appoint to the trust, one, or if necessary, two of the sons of the deceased. In conferring the trust, regard should be had to superiority of qualifications, and, supposing all the sons to be equal in this respect, respect should be paid to seniority.*

* It is not by any means necessary that the trust and superintendance should be continued in the family of the person originally nominated to be the *Mootuwulee*. It is an office of a personal nature and not heritable; but it has nevertheless been usual to prefer (*cæteris paribus*) the late incumbent's family to persons who are entirely strangers.

CHAPTER X.

PRECEDENTS OF DEBTS AND SECURITIES.

CASE I.

Q. The heirs of a person, who died involved in debt, have signed a document renouncing all claim to the inheritance and declining to interfere with the estate, in consequence of the incumbrances exceeding the assets; which fact has been proved. In this case, should there be any preference shown in satisfying the claims of those creditors to whom the debts were contracted at an earlier period, over those to whom the debts were contracted at a later period? and is there any difference prescribed as to the order of liquidating the debts of a simple contract creditor, and those of creditors holding bonds or promissory notes of the debtor? are there any circumstances which entitle one creditor to a preference over another, or are they all entitled to equal consideration in the distribution of the assets?

Rules for appoitioning the assets of an insolvent estate to satisfy the claims of several descriptions of creditors.

R. If the assets of the deceased's estate are not sufficient to answer all legal demands, and there be many creditors, they are all entitled to satisfaction, in proportion to the amount of the debts due to them respectively; in other words, he to whom a greater sum is due will obtain a larger proportion of the assets, and he to whom a less sum is due will obtain a smaller proportion. Equality will not be observed, where some debts are greater than others; but whether the debt be founded on simple contract or on a promissory note or bond, and whether it has been contracted at an earlier or a later period, are matters which do not at all affect the claims of the respective creditors. The only difference is, that the liquidation of debts contracted or acknow-

ledged on a death-bed sickness, should be postponed until after the satisfaction of such debts as were contracted by the deceased at a period when he was in health.*

CASE II.

Q. A person was indebted to his nephew in the sum of forty-one rupees. All his property consisted of ten *beegahs* of land. On his death-bed, being of sound disposing mind, he directed that two and a half *beegahs* of the land should be set apart in satisfaction of the above debt, and devised the remaining seven and a half to his wives, as a *Hibba-bil Iwuz*, or gift for consideration, in satisfaction of their claim of dower. The deed containing this disposition of his property was duly signed and attested; but the creditor above-mentioned was no party to it. He died about six hours after the execution of the deed. The provisions of such deed being prejudicial to the creditor, should it, according to the Moohummudan Law, be upheld, or set aside?

A debtor on his death-bed cannot devise or otherwise alienate his property to the prejudice of a creditor.

R. A person during health contracts a debt to his nephew, and also to his wives, and that person, during his last illness, devises, by a *Hibba-bil Iwuz*, or gift for consideration, to his wives, in satisfaction of their claim of dower, seven and a half of the ten *beegahs* of land, which constitute his sole property, and sets apart the remaining two and a half *beegahs* to satisfy his creditor's debt; and having executed a deed to the above effect, dies. Under these circumstances, if the property set apart for the creditor be not sufficient to liquidate the debt due to him, the *Hibba-bil Iwuz* executed by the deceased will have no validity, according to Law.

* See Prin: Debts and Secur: 2.

The land must be sold, and the proceeds proportionally divided between the creditors and the wives, according to their respective claims.*

CASE III.

Q. A person being involved in debt to an amount larger than his property is capable of satisfying, dies, leaving a wife, who, on his decease, claims her dower out of the estate, and other creditors come forward who claim to have their debts satisfied from the same source. In this case what is the legal course to be adopted?

R. If the property left by the deceased be inadequate to satisfy the demands of all the claimants or creditors, a *pro-ratâ* distribution must be made among them. The Law makes no distinction between a debt of dower due to a wife and debts due to other creditors. All debts (contracted in health) are of equal validity, except those of mortgagees or pawnees, that is to say, persons with whom the property of the deceased may have been deposited in mortgage or pledge. The claim of such persons are entitled to priority, and they are authorized to satisfy their own demands out of the property in their possession; after which the surplus (if any should remain) will be divided among the other claimants.

A mortgagee may pay himself out of the mortgage on the death of his debtor.

* It is a rule in Law that debts are claimable before legacies, and that an acknowledgment of a debt in favour of an heir resembles a legacy. In this case the deceased acknowledged a debt to his wives who are his heirs, consequently his special acknowledgment in their favour is of no avail, but they are entitled to a proportional share of the assets in common with other creditors. Had the persons in whose favour the acknowledgment was made been strangers even, still the disposition would not have availed them, nor would they have been entitled to any preference in the liquidation of their claim, because every disposal of property on a death-bed is considered as a legacy, which cannot extend to more than one-third of the estate, and the satisfaction of which must be postponed until after the liquidation of debts. See. Prin: Wills 6. 7.

This opinion is in conformity with the *Kifaya* and other legal authorities.*

CASE IV.

Q. A Moosulmaun being on the point of death, nominates a person to be guardian of his minor children and manager of his houses, lands, and other property. The person, so appointed, borrows some money during the minority of the children, for the purpose of defraying the balances of government revenue that had accrued on their estate. During the minority of the children, the debt was not repaid to the lender. If, after their attaining the age of majority, the lender should claim his due from them and from the guardian, from whom will he receive it, from the guardian or from the wards?

Of necessary debts contracted by a guardian.

R. If, in the case stated, the lender claim his debt as due from the wards, that is to say, from those who were minors, and it be proved due without any appearance of fraud or breach of trust on the part of the guardian, he will recover from the wards. It is held in books of Law, that on account of food, raiment, and land-tax, which means the government revenue, due from the estate, it is legal and allowable for the guardian to contract debts, on behalf of his minor ward; because the guardian contracts a debt for the benefit of his ward, and the preservation of the estate, and applies the money to the necessary purposes of the ward. As the debt of the creditor was not liquidated during their minority, and as they have now grown up and are of full age, this debt must be paid out of the property of the wards, of which they are now seized and in possession.†

* See Prin: Debts and Secur: 20. † See Prin: Debts and Secur: 6.

CASE V.

Q. A person sues the widow and son of a landed proprietor for a portion of the estate left by the deceased, in satisfaction of some unadjusted claim. The widow pleads that her husband made over to her by deed and put her in possession of his entire property during his life-time, in lieu of dower. Under these circumstances, is the whole property to be reserved in satisfaction of the dower, or is the claim on this account to be considered on a footing with that on account of other debts?

Of a debt acknowledged on a death-bed.

R. A claim on account of dower and claims on account of other debts are entitled to equal consideration in the order of payment out of the assets, excepting a claim on account of a debt which the deceased may have acknowledged during his last illness, and which he is not known to have *boná fide* contracted. Such claim should not be satisfied before the other debts are discharged. But if, as appears to be established in the present case, the property was made over to the wife and taken possession of by her during her husband's life-time, it cannot with propriety be termed the estate of the deceased, or be considered available as such.

CASE VI.

Q. A debt having been acknowledged in the same bond jointly by two persons, and one of them subsequently deceasing, is the whole debt recoverable from the surviving obligor?

Case of a joint bond, one of the debtors dying.

R. If the parties, who joined in executing the bond, each participated in the loan, a claim to the whole will not be maintainable against the surviving obligor. He will be responsible for his own half share only. The

chapter of the *Doorur-ool Juwahir,* which treats of loans, contains authority for this doctrine.[1]

CASE VII.

Q. A and B sign their names to an undertaking executed by C and D, as sureties for the punctual payment by the two latter of a debt due by them, according to instalments specified in the undertaking. On failure of the engagement, the creditor sues A, B, C and D, and obtains a decree against them collectively. B. C and D abscond, but A being arrested in satisfaction of the judgment, pays the whole amount of the debt to the creditor, to recover which sum he now brings an action against the heirs of B, his co-surety (B having died) and C and D collectively. Under these circumstances, will an action brought by the surety who has paid the debt lie against the co-surety and the original debtors jointly, and will his claim against the heirs of his co-surety be valid according to Law; and supposing his claim to be valid against his co-surety, or the representatives of that person, notwithstanding the existence of the original debtors; and, supposing the security bond not to specify for how much the sureties were to be responsible respectively, what portion of the debt will be demandable from the estate of the co-surety B, and what portion from the original debtors C and D?

Case of two joint sureties and one of

R. The action brought by A, (the surety who paid the debt) against the heirs of B, his deceased co-surety,

[1] This doctrine seems conformable to the Roman Law, by which, when several persons contracted an obligation jointly, each was liable for his own part only, unless it was particularly stipulated that they should be bound *in solido*; but this is the reverse of the English Law, according to which, an obligation contracted generally by several persons is a joint obligation, unless there is something in the nature of the subject to induce a different construction and render it several in respect of the separate interests of the contracting parties.—*Evans on Pothier,* No. 11. § 2. See Prin: Debts and Secur: 8.

and against C and D jointly, will lie, provided the heirs realized any assets from the estate of their ancestor. The original debtors will, in the first instance, be liable for the debt, but, in the event of their insolvency, one moiety must be discharged by A, and the other moiety by the representatives of B, if they have assets. The Law is, that when two persons become sureties *in solido* for another, half of what the one pays is recoverable from the other, and the whole is recoverable from the original debtor, because any payment made by one operates in an undefined manner for both. Of two sureties, if one discharge the entire debt, and then come upon his co-surety for reimbursement of half, and they afterwards unite in suing the principal debtor, it is the same thing as if both sureties had originally combined to discharge the debt of the principal, one of them in person and the other through his agent; according to the *Hidaya*,—" Whatever payments either of the two may make are made in an undefined manner on account of both, and the person making such payments is entitled to exact the half of them from the other, and then they are jointly entitled to exact the whole of what has been paid, from the principal, since they paid the same on his behalf; the one making the payment immediately from himself and the other doing it as it were by substitute." But if the surety can recover by exacting restitution from the principal debtor, previously to his preferring his claim against the co-surety, he should exact the whole amount from the principal debtors. According to the *Futawa Aulumgeeree*,—" If he can recover from the principal before proceeding against his co-surety, let him exact from him (the principal) the whole thousand.*"

them being compelled to pay the whole debt.

Of one of two sureties having paid the debt and realized the half of it from his co-surety.

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* The general rule is that where two persons are joint securities for the payment of a debt and one of them dies, the survivor will not be considered as surety for the whole debt. See Prin: Debts and Secur: 4.

CASE VIII.

Q. A copy of the agreement, executed by the defendant, dated the 19th of *Jumadee-oosanee* 1209, and a copy of the agreement executed by Anoop Singh, dated the 22nd of the same month and year, and a copy of the engagement entered into by the plaintiff and others in favour of the defendant, agreeing to renew the lease in the event of the profits not repaying the money borrowed; being shewn to the *Kazee* of the court, he was asked whether, with reference to those documents, the transaction could be considered in the light of a mortgage taken with a view to usury?

Of an estate assigned in mortgage for the liquidation of a specific debt.

Q. On an inspection of the three documents, it appears that the lessors, mentioned in the question, gave an assignment to the defendant on the profits of an estate to endure from the beginning of 1212 A. H. to the end of 1814 A. D. on account of the sum of 2250 Rupees, paid in advance by him, which was found to be due on an adjustment of the accounts of a former lease. The estate was in the nature of a mortgage, and it was stipulated that the profits should be employed for the reduction of the principal debt. But the defendant, who was the assignee and in possession under the assignment, let the estate in farm to Anoop Singh for the sum of 3,300 rupees. Under these circumstances in point of fact the excess sum of 1,050 rupees (over and above the 2,250 rupees) profits of the mortgaged farm must be considered in the light of usury; and it is unlawful and prohibited for a Moosulmaun to take interest openly or covertly.*

* The suit was in this instance brought to recover the excess above the debt which had been realized by the defendant from the lands of the plaintiff, and it seems but fair that the transaction should have been held to be usurious, especially as the defendant risked nothing, the plaintiff having agreed to renew the assignment in the event of the profits not proving sufficient, within the period first stipulated to liquidate the debt.

CASE IX.

Q. A person mortgaged his landed estate for a loan* of twelve thousand rupees. Afterwards the mortgagor and mortgagee settled their accounts, by which there was found a balance of two thousand rupees due from the former, who, for the satisfaction of the balance, executed an agreement, assigning over the lands to his surety, on consideration of his engaging to pay the balance. The mortgagee did not return the deed of mortgage to the mortgagor, yet neither he (the mortgagee) nor the surety were in possession of the property from the time of the execution of the agreement. The mortgagor before liquidation of the debt of two thousand rupees disposed of all his right and title in the estate, by gift, in favor of his sons and executed a deed of gift in their favour. Under these circumstances, is the gift available in Law, notwithstanding the non-liquidation of the balance due?

R. The mortgagor was not at liberty to dispose of the property by gift, until the redemption of the mortgage, without the consent of the mortgagee, and by the agreement it does not appear that the mortgage was redeemed, or that the mortgagee gave his consent to the gift. The only inference that can be drawn from the agreement is that the mortgagee was willing to permit the redemption of the mortgage, on condition of the mortgaged lands remaining in the possession of the surety, who would, from the profits thereof, satisfy his

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It is a well known principle of Moohummudan Law that interest is entirely prohibited, and that the giver, as well as the receiver, of any excess above the original debt is held to act sinfully. In practice this principle is not much adhered to, and some modern lawyers have gone the length of asserting that the receipt of interest from a person not professing the Moosulmaun faith should not be accounted usurious. This however is practically a matter of little consequence, as our courts, I imagine, would not scruple to award interest in an action between two Moohummudans, where it was specifically promised, or where it was equitably due, notwithstanding the scriptural prohibition.

claim for the sum of two thousand rupees by periodical instalments. This affords no ground for rendering null and void the mortgage, which continues in full force. It is laid down in books of Law that, if a mortgagor and mortgagee mutually agree to the redemption of the mortgage, still the mortgage remains in full force, until the former, in consequence of such redemption, return the mortgaged property to the latter, in which case the contract is rescinded. It now remains for consideration, that from the period of the execution of the agreement alluded to, neither the mortgagee nor the surety were in possession of the mortgaged property. By this fact it clearly appears that the property reverted to the possession of the mortgagor, and that he neither made it over to the surety nor permitted it to remain in the possession of the mortgagee. If it be proved that the mortgage was actually redeemed and that the mortgagee restored the possession of the property to the mortgagor in consequence thereof, in this case the mortgage is null and the gift complete; otherwise, if the mortgagor made seizin without the consent of the mortgagee, he committed a trespass, from which act the mortgage cannot be invalidated nor the gift held to be valid. As is laid down in the *Hidaya*,—"Upon a person receiving a pledge which is distinguished and defined, (that is, unmixed and disjoined from the property of the depositor,) the acceptance being then ascertained, the contract is completed, and consequently binding, (until, however, the seizin actually take place, the pawner is at full liberty either to adhere to or recede from the agreement)." Now when the contract is in this manner rendered complete, the right of the mortgagee is established, and if the mortgagor transfer the property so mortgaged to another person by gift, the act is invalid; because it cannot hold good without destroying the right of the mortgagee, and it is equally

A mortgage cannot be set aside by any means, but by a *bonâ fide* adjustment and liquidation.

Authority cited on the doctrine of pawns or mortgages.

obvious that if the mortgagor, by an act of trespass, dispossessed the mortgagee, the mortgage would still continue in force, because the contract is not thereby annulled. It is declared in the authority above-quoted, —"If the pawner sell the pledge without the consent of the pawnee, and again, before the pawnee has signified his assent, sell it to another person, in that case whichever of these two contracts the pawnee may confirm is valid; for as the first sale is dependant on the consent of the pawnee, it cannot prevent the second from being so likewise. If therefore, the pawnee chuse, he may ratify the second sale. If on the contrary, the pawner, after having first sold the pawn as above, should let, give or pawn it to another person, and the pawnee give his consent to such lease, gift or pawn, the sale which preceded either of these deeds is valid. The difference between these two cases is, that in the first (where one sale is made after another) the pawnee may derive an advantage from confirming either of them (as his right lies in the price) and whichever therefore he approves is valid. In the case of a lease or gift, on the contrary, no advantage can accrue to the pawnee, as his right lies in the return for the article, not in the usufruct. If therefore, the pawnee approve of either of these, he by consequence impliedly assents to the abolition of his own right; and the previous sale (which was suspended on his consent only because of his right) becomes valid of course." Agreeably to the above doctrine, it is evident that if a mortgagee* give his consent to the gift of the mortgage to another person, such assent implies the abolition of his own right; consequently if the mortgagee in the present case gave his consent to the gift of the property, the gift is valid and

* The term *rahn* signifies both pawn and mortgage, and the rules by which the one description of pledge is governed are equally applicable to the other.

the mortgage is rescinded. So also in the *Hidaya*,—"If also the pawner discharge the debt in part, still it remains with the pawnee to keep possession until he shall have received payment of the balance. In the same manner, if the pawner and pawnee should, by mutual consent, dissolve the contract of pawn, the pawnee may, nevertheless, keep possession of the pledge until such time as he receive payment of his debt, or exempt the pawner therefrom."*

CASE X.

Q. 1. A man dies, being indebted to his wife for her dower. Has she a lien on the personal property left by her husband in satisfaction of such dower, in preference to the other heirs?

A woman has a lien for her dower on her deceased husband's estate.

R. 1. If the other heirs pay the widow the amount of her dower, she has no claim on the property left by her husband, except for her legal share of the inheritance; and if they do not pay her the amount of her dower, she has, in the first instance, a prior claim on account of her dower on the property left by her husband, whether real or personal. The residue, after her claim of dower is satisfied, will be divided between her and the other heirs, according to their respective shares of inheritance.

Q. 2. A certain deed, purporting to be a *Mocurreree sunnud* or lease in perpetuity, having been shown to the law officer, he was desired to declare, whether or not it was valid; and if valid, whether the grantee could, by virtue of it, possess himself of the landed estate of the grantor?

A contract to pay the debts of a lessor in

R. 2. This *Mocurreree sunnud* is invalid, because it may be inferred from the tenor of it, that it signified a

* For the doctrine in cases of Pawns and Mortgages, see Prin: Debts, &c. 14 to 20.

lease, in return for which lease it is stipulated, that the grantee or lessee shall liquidate the demands of the creditor of the grantor. In Law such a contract vitiates the lease; and even admitting the condition to be valid, the grant would expire with the grantor.

consideration of a lease is invalid.

Q. 3. Admitting, for the sake of argument, that the lease would not be determined by the death of one of the contracting parties, should the amount of the widow's dower be paid out of the property, which is now in the possession of the lesseo, or, according to the terms of the contract, may the lessee pay the debts in any mode that he can, retaining possession of the lease; or should the land be transferred to the possession of the widow?

R. 3 Admitting that the lease would not be determined, still, if the amount of the dower cannot be paid without the sale of the property left, the lease will be determined by a sale to liquidate the dower, and the proceeds will be employed for the payment of the dower and the other debts; and if the proceeds should be found insufficient to discharge the whole of the claims, the widow and the other creditors will share proportionately; for instance, if the amount of the dower is three hundred rupees, and the claims of other creditors amount to two hundred and the proceeds furnish only five rupees, the widow will obtain three rupees in liquidation of her claim of dower, and the other creditors will obtain two. This goes on the supposition that the estate is not mortgaged: if mortgaged, the debt due thereon must be first discharged, and the surplus shared proportionately amongst the creditors and the widow.*

When a lessor dies in debt, his estate must be sold in satisfaction.

And a *pro-ratâ* distribution of the proceeds made.

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* The above opinions were delivered by the *Mooftee* of the Patna Provincial Court, and the same questions having been propounded to the *Kazee* of the Court, his replies were similar in purport, but rather more full, to the following effect:—

CHAPTER XI.

PRECEDENTS OF CLAIMS AND JUDICIAL MATTERS.

CASE I.

Q. A person being dispossessed of certain slaves, did not lay claim to them for a period of upwards of twelve years: does his dispossession in this instance operate to extinguish his right to them, as is the case with respect to other property under similar circumstances?

First,—It is not necessary that the amount of dower should be specified in writing: deeds of dower and other legal documents are merely used to preserve the memory of a transaction. Between two contracting parties a verbal stipulation is sufficient, and should the matter be contested, the dower will be established at such an amount as may be proved to have been stipulated by the husband, by two competent witnesses. The claim will in this manner be legally established.

Secondly,—As this is a claim of dower, which must be satisfied before claims of inheritance, the dissent of the heirs cannot avail. The whole property left by the husband, whether real or personal, must first be applied to the liquidation of the claim of dower.

Thirdly,—This grant in perpetuity virtually signifies a contract of lease, and a lease without a term, whether long or short, is not good or valid; and, as in a lease in perpetuity, there is no term specified, the legal condition is wanting, and, according to the Moohummudan Law, such lease cannot be valid and binding. Although this deed sets out with declaring, that the lease shall endure for a century, commencing from the year 1207, which may be construed into a long term, yet it goes on to declare, that it shall continue hereditarily to the latest posterity, which manifests a clear intention, that it is to remain in perpetuity. This condition is repugnant and fatal to the declaration of a term, and the term no longer exists. And even admitting that the term specified, namely, one hundred years, should be held to continue in force, still it can only endure so long as the contracting parties live. As this is a contract of lease, it expires and is determined by the death of one of the contracting parties, because on this point the Law is explicit, that "a lease is determined by the death of one of the contracting parties," that is to say, the lessor or lessee. Under these circumstances the property, which was leased must be held to form a constituent part of the estate of the deceased; and out of it the dower must be paid.

Fourthly,—As by Law the contract of lease expires and is determined by the death of the lessor, it is not incumbent on or competent to the lessee, to liquidate the claim of dower. The lands which were let in lease must revert to the widow of the lessor, who is both his heir and his creditor.

R. When the right of any person shall have been established to any thing, whether consisting of slaves or other property, real or personal, his right thereto cannot be extinguished by dispossession for any length of time, whether exceeding or falling short of twelve years.*

No limitation of time to bar a claim.

CASE II.

Q. The law officers were desired to inspect a certain power of attorney and to state, whether, under it, the agent had or had not a right to sell, according to the Moohummudan Law; and if he had, what illegality had occurred in his drawing up the deeds of sale, and supposing those deeds to be valid according to Law, in virtue of the authority of the agent, whether the deeds of sale and receipt had been drawn out by such agent in the form prescribed by Law; what objection was apparent, and whether the sale of the estate conveyed in those deeds was good in Law or not?

R. The power of attorney is not drawn out according to the language and form required by legal technicalities; but from its tenor it may be collected, that Chuttersal Narain made over to his son Byjnath Narain the conduct of all his affairs, and conferred on him a general power of attorney to sell, mortgage, and manage his estate. Therefore, if it be proved by competent witnesses, that Chuttersal Narain really authorized his son

Informality in a deed does not vitiate a contract founded thereon.

* This question seems to have been propounded with a view to the regulations of Government, rather than to the principles of Moohummudan Law. According to the provisions of the regulations, no claim for personal property can be entertained if the cause of action have arisen twelve years antecedent to the institution of the suit, nor a claim to land or other immoveable property, unless injustice or dishonesty be alleged; but even with regard to this species of property the term of sixty years is an absolute limitation in bar. According to the Moohummudan Law, however, there is no limitation in point of time to defeat any claim of right, which must be determined solely by its merits. See Prin: Claims &c. 1 and Note.

Byjnath Narain to manage all his pecuniary affairs, and granted him full permission to sell, mortgage, or otherwise dispose of his property, the said Byjnath will be fully and legally empowered to sell the property. The deed of sale and the receipt are incorrect, because, from the body of the deeds, it may be collected, that Chuttersal Narain himself was the actual seller, and the person who executed the deeds, and from the words written underneath, and the *Kazee's* attestation, it would appear that the sale was conducted by attorney, and that the contractor was Byjnath, his agent. Such a paper, therefore, is not strictly a legal instrument; but should it appear by the evidence of witnesses, or by other means of proof, that the said agent or his principal did *bonâ fide* make the sale, it will be good and valid according to Law: and the formal errors in the deeds, which may be attributed to the ignorance of the person who wrote them, are not sufficient to invalidate the sale.*

CASE III.

Q. A person purchased a female slave, whom he still retains in his house in a state of slavery. By her he had a son and daughter. The latter was committed by him to the possession of his sister, in whose family she now continues, performing the duties of a slave. The person above alluded to now sues his sister, to recover possession of the daughter of the female slave purchased by him, and adduces as a witness in support of his claim, the mother, who has all along remained in a state of slavery. Under such circumstances, is the evidence of the female slave, purchased as above-stated, admissible, according to the Moohummudan Law?

Evidence of slaves inadmissible.

R. Under the circumstances stated, it appears that the person adduced as a witness is a female slave, but it is

* Prin: Claims, &c. 10.

a maxim in Law, that the evidence of slaves is totally inadmissible. Therefore the testimony of the mother of the slave girl cannot be received.*

CASE IV.

Q. In a matter involving some pecuniary profit and benefit to a childless woman, is the testimony of her husband or her father admissible or not?

R. According to Law, the evidence of the husband or of the father of a claimant is not admissible in a matter operating to his benefit.†

Favorable testimony by a husband or father inadmissible.

CASE V.

Q. A sale of lands was made by a person, at a period when he was upwards of one hundred years of age. Can a contract, made at so advanced a period of life, be considered valid and binding upon his heirs; and is the evidence of the servants of the purchaser admissible for the purpose of substantiating the sale?

R. If the vender was of sound disposing mind at the time he made the sale, the contract will be binding against his heirs, at whatever period of life it may have been executed; but the evidence of a servant in favour of his master is by no means admissible.‡

Evidence of a servant inadmissible.

CASE VI.

Q. A dower of seventy-five thousand rupees was alleged to have been settled on Oomda Beebee (the mother of Qaim Beebee, and wife of Gholam Hoosein Khan,) at the time of her marriage with that person. The wife of Gholam Hoosein died before him, leaving

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* See Prin: Claims, &c. 10. † Prin: Claims, &c. 11.
‡ See Prin: Claims, &c. 11.

her daughter Qaim Beebee, a brother and three sisters, as her heirs. Afterwards Gholam Hoosein died, leaving his mother, his daughter (Qaim Beebee), two wives, two sons, and three daughters. Oomda Beebee, in her life-time, neither claimed nor disclaimed her right to dower. Under these circumstances, can her heirs claim it out of the property left by Gholam Hoosein Khan? and if so, how much of it will go to Qaim Beebee, the daughter of Oomda Beebee.

R. One female witness states, that she was on the spot at which the marriage took place, that is to say, in the assembly where the declaration and consent were expressed; that the marriage was contracted in her presence; and that Gholam Hoosein agreed to pay Oomda Beebee dower to the amount of seventy-five thousand rupees. From such assertion it would at first sight appear, that this witness had actually heard the agreement of Gholam Hoosein; but on being cross questioned, she states, that she, the bride's mother, and others remained in company with the bride, and that the bride's mother sent a message to the bridegroom, desiring that the sum of seventy-five thousand rupees should be fixed as the amount of her daughter's dower, and that Gholam Hoosein agreed to be responsible for the payment of this sum; that the declaration and consent were expressed in a male assembly, and that she (the witness) was never present in a male assembly, not even at the marriage of the daughters of Gholam Hoosein. From the evidence of the witness, who speaks of a message, and of her not being in the male assembly, it is plain, that the bride did not enter the male assembly, and there make the agreement. Besides it is not customary to do so. There still remains the supposition, that this witness may have gone to the door of the room, in which the marriage was con-

tracted, and overheard the conversation, which indeed appears, from the evidence of another witness, to have been the case; but as the witness herself has not stated this, the bare supposition of it will not suffice in evidence. Besides, the witness in question is one of the heirs of Oomda Beebee, and her declaration, that she has no right to a share in the property, but that Qaim Beebee is entitled to the whole, does not exclude her from the inheritance, should she afterwards claim it; because by so doing she does not establish the right of another to her share. This is not a relinquishment, (legally speaking) and even if it were, there is considerable difference of opinion as to the effect of relinquishment. The evidence of another female witness is contradictory. Besides, her admission that she was the slave of Oomda Beebee, renders her evidence nugatory.* The evidence of the two other witnesses, one man and one woman, who heard the amount of dower fixed from a place near the assembly, in which the marriage was contracted, is good, although they were not actually present in the assembly; but they fall short of the number which the Law requires. The deed, however, stipulating the amount of dower, produced by the claimant, as having been executed by Gholam Hoosein, has been duly proved by witnesses, and has not been denied by her adversary; and even admitting, that the dower stipulated exceeds the amount of dower usually payable to females of the same family, still the agreement is binding; and, in point of fact, it has been proved by some witnesses, that the other daughters of the same family received upwards of one hundred thousand rupees as dower. The evidence as to the acknowledgment of Gholam Hoosein, though not in itself conclusive, is nevertheless confirmatory. The at-

Evidence of one heir in behalf of another.

And of a slave.

And of one man and one woman.

* See Prin.: Claims, &c. 9. 10.

tempt to prove forgery has wholly failed. The result is, that the amount of dower has not been legally proved by witnesses present in the assembly, at the time of the contract, but the deed stipulating the dower, has been found to be good and valid, and the witnesses to it are unexceptionable. In virtue of that deed, therefore, the heirs of Oomda Beebee are entitled to take the amount of her dower out of the estate of her deceased husband. Out of the whole debt of dower, *viz.* seventy-five thousand rupees; eighteen thousand seven hundred and fifty will be deducted on account of the share of her husband; and Qaim Beebee will get half or thirty-seven thousand five hundred rupees; the widow's brother will obtain seven thousand five hundred; and her three sisters three thousand seven hundred and fifty each.

Of a daughter with a husband, a brother and three sisters.

CASE VII.

Q. A person died leaving three wives. By his elder wife he had a daughter, who died before her parents, leaving two sons and four daughters. The elder wife lived with her husband for a period of upwards of sixty years, and her death occurred some years subsequently to his, without her ever having realized the sum due to her on account of dower. By his second wife he had a daughter, who is still living, and is now the plaintiff in this action, to recover the paternal estate. His third wife died childless. The sons and daughters of the deceased proprietor by his elder wife, being six in number are still alive, and the elder son, who is the defendant, pleads in answer to the claim, in the first place, that the whole proceeds of the estate are not sufficient to answer the demand of dower due to the elder wife, which amounts to fifty thousand rupees; that, in the second place, admitting the value of the estate to exceed the sum mentioned, the defendant and his brethren, who

are children of the daughter of the elder wife (there being no other legal sharers or residuaries) are entitled to her eighth share of the property in addition to the stipulated amount of dower; and that, in the third place, the plaintiff, who calls herself the daughter of the second wife of the deceased proprietor, was, in point of fact, the daughter of the slave girl of his (the defendant's) grand-mother who was never married to his grandfather, and that, consequently, she had no right or title to succeed to any part of the property. But the plaintiff denies the truth of this latter allegation, nor can the defendant adduce any evidence to substantiate it; neither is he able to bring forward any deed showing that the amount which he claims as the dower of his grandmother was ever settled upon her. Under these circumstances the question is; if a married woman live with her husband for a period exceeding sixty years, and during the whole of this time does not obtain from him the sum due to her as dower, nor from his estate after his decease, and subsequently die, having had a daughter, who died during the life time of her parents, are the children of such daughter legally competent to claim the sum due to their grand-mother on account of dower?

Dower of a deceased woman claimable by her grand children, notwithstanding any lapse of time.

R. Dower is a constituent part of a marriage contract, and it is an established point of Law that it continues to be a debt due from the husband, until it shall have been satisfied or remitted. The children of the daughter, who died before her mother, are ranked among the distant kindred of their grand-mother, and they are her heirs, provided there are no preferable claimants, such as legal sharers or residuaries; and they are therefore entitled to claim the sum due to her on account of dower. Lapse of time is not a legal impediment to a claim of dower. Some modern Lawyers, indeed, arguing on the ground of there being many

false claims preferred in those days, urge the propriety of rejecting those of very long standing. The term of limitation according to some is three and thirty years. According to others it should be restricted to a cycle, which is interpreted by some to signify thirty, and by some eighty years. Supposing then the amount of dower claimed to be established, the Law relative to limitation is as above specified. In the event of its not being established, recourse must be had, agreeably to the opinion of the two disciples, to an ascertainment of the proper dower of the defendant's grand-mother and also of the plaintiff's mother.*

Rules of limitation according to modern and less received authorities.

CASE VIII.

Q. A person lays claim to certain property, in virtue of an alleged gift, and subsequently in virtue of inheritance. Is oppugnancy so far established as to defeat the claim, by reason of the different assertions, with respect to the mode by which the right accrued?

Case of a claim by purchase and by inheritance by the same individual.

R. There is no express rule of Law which declares that a claim of inheritance should be maintained, if made at a time subsequent to the claim of gift, but there is legal oppugnancy if the claim of inheritance be prior in point of date; as is laid down in the *Foosool* cited in the *Ibrahim Shahee*,—"If a person lay claim to a house, alleging that he had purchased it from his father, and afterwards claim it in virtue of inheritance, the claim should be admitted; but if he, in the first instance, claimed the house in right of inheritance and afterwards in right of purchase, the claim should not be admitted, oppugnancy being established." The reason of this appears to be, that the right of inheritance

* See Prin: Claims, &c. 1 and note.

does not attach to any thing that was not the property of the deceased, at the time of his death. A claim, therefore, of inheritance supposes the right of property to be vested in the deceased at the time of his death; but, by a claim of purchase, the right is supposed to be vested in the claimant himself before the death of the former proprietor, in which there is an evident oppugnancy, the case being the same as if he had first admitted the right to belong to another, and afterwards assumed it for himself. Therefore a claim of purchase can never be entertained after a claim of inheritance preferred by one and the same individual. But it is otherwise where the claim of purchase precedes that of inheritance; because, when the title to the thing in virtue of purchase is advanced, the right thereto is maintained to have vested in the claimant before the death of the former proprietor, and, by advancing a title of inheritance, he claims the property of the deceased, which does not constitute oppugnancy of such a nature as to affect the admissibility of the claim; as is declared in the *Ibrahim Shahee,*—"Oppugnancy affects the admissibility of a claim, only when it is adduced to render null and void the acknowledged title of another individual." So also in the *Foosool Imadeeya,*—"Should a person allege that certain property belongs to such a one, and afterwards claim it as belonging to himself, his claim is inadmissible, as affecting the acknowledged interest of another." And this consequence must necessarily arise where a claim by purchase is preferred subsequently to a claim preferred in virtue of inheritance. It is laid down also in the same authority, that "if a person having property in his hands should make use of such expressions as the following: "This does not belong to me, or I have no right, title or interest therein," at a time when there was no ostensible claimant to such property, and sub-

sequently, on a claim being preferred, the party in possession should assert that he himself is the rightful owner, it is fair and admissible, notwithstanding the oppugnancy; because, by the use of such expressions, there is no admission of a right vesting in any particular person, and oppugnancy affects the admissibility of a claim, only where it is adduced to render null and void the acknowledged title of another individual." Upon this principle, as the claim by purchase does not involve the admission of the right being vested in any other person, so the subsequent claim by inheritance does not render null and void the acknowledged title of another individual. Besides, there is no difference between a claim of inheritance preferred subsequently to a claim of purchase and a claim of inheritance preferred subsequently to a claim of gift, nor is there any difference between a claim of purchase preferred subsequently to a claim of inheritance and a claim of gift preferred subsequently to a claim of inheritance. Neither the claim of the gift nor of the purchase, involves the admission of the right being vested in any other person, which right, if acknowledged, would be rendered null and void by a subsequent claim of inheritance. But should the orders of the claims be reversed, this will occur; because by the claim of inheritance the right is admitted to have remained vested in the former proprietor up to the day of his death, which right, so acknowledged, the subsequent claim of gift or purchase is adduced to render null and void, by which the oppugnancy occasioning disability is established. In the case in question therefore the claim should be entertained, and without reference to the oppugnancy, it should be decided on its merits, according to the established mode of proceeding; that is by evidence or by acknowledgment or by refusal of purgation by oath; according to the *Ashbah-o nuzayir*,—" The decision of a

And of a claim by gift and by inheritance.

Judgment whereon founded.

Judge should be founded on evidence, or on acknowledgment, or on refusal of purgation by oath."*

CASE IX.

Q. A dispute exists between the plaintiff and defendants, the former claiming six houses which are in the possession of the latter, alleging that they are his patrimonial property. This the defendants admit, but plead that the ancestor of the plaintiff mortgaged the premises to their ancestor, for the sum of seven hundred and seventy-five rupees; they state that they have no deed of mortgage, but that the fact is recorded in the account books of their ancestor. The plaintiff replies that he had heard from his mother, who was the mortgagor of the houses and also from others of his relations, that the debt for which the houses were mortgaged amounted only to four hundred and forty-six rupees. The parties have no evidence to prove the truth of their respective allegations respecting the amount of the sum. Under these circumstances, to which of the parties' assertions should credit be given? Are the account books of the defendants, unsupported by other proof, admissible as evidence, or can the mortgage be redeemed on payment of the sum mentioned by the plaintiff as constituting the original debt, and to which of the parties should an oath be administered?

Case of a dispute between a debtor and creditor as to the amount of a debt on mortgage.

R. The defendants admit that the houses mortgaged to them are the ancestorial property of the plaintiff. The only dispute arises from a difference in the statement regarding the amount of the debt, on account of which they were mortgaged. The plaintiff admits a debt of four hundred and forty-six rupees, and denies the excess above that sum claimed by the defendants.

* See Prin: Claims, &c. 22 and 23.

They have no proof of the excess claimed by them. The assertion on oath of the plaintiff should be credited; for he denies the excess of the claim alleged by the defendants. An oath should be administered to him, and he should swear that he heard from his mother and relations that the houses were mortgaged in security of a debt not exceeding four hundred and forty-six rupees, and that he never heard the debt mentioned as exceeding that sum. The account books of the defendants, unsupported by proof, are not admissible as evidence.*

Private account books, not admissible evidence.

CASE X.

Q. After the death of the husband, if it cannot be proved with what intention he bestowed on his wife money and effects during his life-time, is her assertion to be credited according to Law, or is the assertion of the husband's heirs entitled to a preference, in determining with what intention the deceased parted with his property?

Case of a dispute between the widow and the other heirs as to her having received property from her husband.

R. If the assertions of the widow and the heirs should be at variance on this point, the heirs asserting that the husband had given to the widow certain property, and she denying the receipt of such property, in this case it is incumbent on the heirs to adduce witnesses; and, if they have no evidence, the denial of the widow on oath will be credited. Such also is the rule of proceeding if their assertions should be at variance with regard to the value of the property received: the heirs asserting that the widow had received property to a certain amount, and she stating it to have been of less value. If their assertions should be at variance on another point: the heirs stating that the husband had given her the property in

And as to the value thereof.

And as to the terms on which it was received.

* See Prin: Claims, &c. 24. The plaintiff in this action may, in one point of view, be said to have been the defendant, as a larger claim was brought against him than he admitted to be just.

satisfaction of her dower, and she alleging that she had received it as a gratuitous gift, it is incumbent on the widow to adduce witnesses, and if she have no evidence, the assertion on oath of the heirs will be credited. If their assertions should vary regarding the household property, the widow claiming the property as her own, and the heirs asserting that it belonged to the husband, and neither of the parties have witnesses to prove their respective allegations, such part of the property as is usually appropriated to female uses will be made over to the widow, on her corroborating her claim by oath, and such part as is usually appropriated to male uses will belong to the heirs on the same condition; and, with respect to property of a common nature, there exists some difference of legal opinion. According to the opinion of Aboo Haneefa, the property will belong to the survivor of the parties to whom it was alledged to have appertained, after oath being made by the survivor. In this case the survivor is the widow; and according to the opinion of Moohummud, it will belong to the heirs of the husband. According to the opinion of Aboo Yoosuf, such part of the property as might naturally have formed the peculiar property of the widow, with reference to her condition in life, should belong to her; and the remainder to the heirs of the husband, and the survivorship of either party can make no difference, as the deceased husband is represented by his heirs.*

And as to the right to household property.

CASE XI.

Q. A plaintiff claims the property of a person named *Bazeed Khan*, five and twenty or thirty years after his death; alleging that she is his daughter. The defendant in reply pleads that *Mussummaut Rai Bail*, the

* See Prin: Claims, &c. 24 to 30.

mother of the plaintiff, was the *hurum* (concubine) of her father, and the slave of *Burree Beebee* his wife, and that she was never married to *Bazeed Khan*. One witness adduced by the plaintiff states his *conjecture* that a marriage took place. Under these circumstances, is the claim of inheritance set up by the plaintiff established? And on which of the parties does the *onus* legally lie of proving or disproving the marriage, on the plaintiff who makes the claim, notwithstanding the admission of concubinage by the defendant? or will the Law presume the marriage of *Rai Bail*, until disproved by the defendant

Rule in cases of denial.

R. The plaintiff, five and twenty or thirty years after the death of *Bazeed Khan*, has sued the defendant for the property left by that person, alleging that she possesses the right of inheritance as his daughter. The defendant, in answer, pleads that *Mussummaut Rai Bail*, the mother of the plaintiff, was the *hurum*, or concubine, of *Bazeed Khan*, and the slave of his wife *Burree Beebee*, and that she was never married to *Bazeed Khan*. This answer involves a denial of the plaintiff's having any right of inheritance as daughter, by reason of her mother's not having been married to *Bazeed Khan*; and it further contends that the plaintiff's mother was the slave of the wife of *Bazeed Khan*, and the concubine of that person. According to the Moohummudan Law, it is necessary, in all claims, that, after the defendant has denied the claim, the plaintiff should prove it; and it certainly is not incumbent on the defendant to prove the invalidity and insufficiency of the plaintiff's claim, which amply appears from his denial; except in a case where the defendant urges a plea to repel the claim of the plaintiff, on proof of which plea the original claim of the plaintiff falls to the ground, and which plea involves a partial admission of the

And in special pleas.

plaintiff's claim. In such case, it becomes requisite for the defendant to establish his plea. For instance, *Zeyd* sues *Omar* for a debt of one thousand rupees, and *Omar*, with a view to repel the claim, pleads repayment of the money borrowed. In this instance it is incumbent on *Omar* to prove the repayment, which, if he should fail to do, the claim of *Zeyd* to the sum in dispute will be established; because the plea of *Omar* involves an admission that the debt was originally incurred. It would have been otherwise had the plea of the defendant not involved a partial admission of the claim, and had expressed a total denial. For instance, *Zeyd* sues *Omar*, the son of *Khalid*, by his wife *Hinda*, for half the property left by *Khalid*, calling himself the half-brother of *Omar*, and son of *Khalid* by another wife (*Zeinub*). *Omar* in answer pleads that *Zeinub*, the mother of *Zeyd*, was always the wife of *Bukr*, and that she could not therefore be the wife of *Khalid*, nor could *Zeyd* be the son of *Khalid*. In this instance it is permitted to the defendant *Omar* to prove the marriage between *Zeinub* and *Bukr*. If he prove it, the claim falls to the ground; and if he do not prove it, still it will be incumbent on *Zeyd* to prove the marriage of his mother with *Khalid*, or the fact of his being the offspring of *Khalid*, in some other mode, before he can be entitled to a moiety of the inheritance. In the suit in question, the defendant denies the fact of the plaintiff's mother having been married to *Bazeed Khan*, and states her to have been the slave of the wife of *Bazeed Khan*, and concubine of that person. This answer therefore involves a total denial of the plaintiff's claim. The defendant, if he pleases, is at liberty to bring evidence to prove that the plaintiff's mother was the slave of the wife of *Bazeed Khan*, in the legal acceptation of the term, and should he prove it, her claim will fall to the ground; but should he fail to prove it, or decline

Example.

Exception in cases of special pleas.

Example.

doing so altogether, still it is incumbent on the plaintiff to prove her mother's marriage, or to establish, by some other mode, the fact of her being the offspring of *Bazeed Khan,* without which she is not entitled to the inheritance. The witness who states that he conjectures the mother of the plaintiff was married, admits that the ceremony did not take place in his presence, and that he never heard *Bazeed Khan* acknowledge the marriage; and he states further that his conjecture is founded on the fact of fornication having been strictly prohibited in the time of *Hâfiz Ruhmut,* (the *Rohilla* Ruler;) whence he concludes that the intercourse between *Bazeed Khan* and the plaintiff's mother must have been matrimonial. Such conjectural evidence however is not admissible in Law; for it is necessary that a witness should possess firm belief. The defendant has admitted that the plaintiff's mother was the *hurum* of *Bazeed,* yet taken along with the context, the use of this expression cannot afford any argument in favor of the marriage. Although the term "*hurum*" does, according to some authorities, signify a married woman, yet, according to the popular acceptation, it is usually meant to denote slave girls and the like, who are taken under the protection of a man, and kept secluded, whether married or not. The term therefore as used by the defendant, (he having distinctly asserted that the plaintiff's mother was unmarried,) must be held to mean a concubine merely. Such expression, therefore, in conjunction with the conjectural evidence of one witness, cannot raise any presumption in favor of the marriage of the plaintiff's mother with *Bazeed Khan.**

Of conjectural evidence.

* The above opinion was delivered by *Moohummud Rashid* and *Hamid Oollah,* the two established Law officers attached to the Court, and judgment was given accordingly; but *Mouluvee Amaun Oollah* (who was at that time officiating for *Surajoodeeen* as *Kazeeool Koozat*) delivered an opinion, declaring that the marriage was established, and that

CASE XII.

Q. A person sues a woman for certain property, alleging that she is not the daughter of the person whom she pretends to be her father, and claiming the property as his right of inheritance. Judgment being given in favor of the defendant, he appeals from the decision, and the woman dying, *pendente lite*, he retracts his former plea, and states that she really was the daughter of the person whom she pretended to be her father, but that he has a right to succeed to her property as her lawful heir, in virtue of his relation to the person whom she styled her father. Admitting the truth of the last plea, is he entitled to take advantage of it, notwithstanding his denial thereof in a former stage of the proceedings?

Claim of inheritance founded on a relation of

R. It appears that the claimant, during the life-time of the woman, to whose property he lays claim, denied her being the daughter of the person whom she called

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the plaintiff was therefore entitled to the inheritance. The opinion is ingenious and erudite; but did not exactly bear upon the case. It does not therefore seem necessary to furnish an accurate translation of it. He admitted that to establish marriage, it was necessary that evidence should be given in favor of it, or that there should be the husband's declaration; and he also admitted that the fact could not be established by the mere conjectural evidence of one witness; but he contended that the defendant, by admitting that the plaintiff's mother was the *hurum* of *Bazeed Khan*, had made out her case. He quoted several works of great authority to prove that the term "*hurum*" signifies a married woman, living in a state of seclusion, but in this case (it should be observed) the object was not to ascertain the true intent and meaning of the term, but the meaning attached to it by the defendant. He further contended that continual cohabitation is *primâ facie* evidence of marriage; and that it is criminal, without proof, to suspect a *Moosulmaun* of so improbable an act as that of fornication; and that where there are two suppositions, it is right to select that which is the more probable. But the question (it should also be observed) in this case, was not, what degree of evidence is required to establish the fact of marriage, but what degree of evidence it was necessary for the plaintiff to bring forward in order to establish her claim, it being a general rule of Moohummudan Law that, on the defendant's denial, the plaintiff must adduce proof of the claim. Had the suit been brought forward to set aside an alleged marriage, the presumption must undoubtedly have been in favor of the marriage; and it would have been upheld by hearsay and circumstantial evidence, such as cohabitation, common repute, and the like. See Prin: Claims, &c. 21.

which the claimant had previously denied the existence.

her father, and that now, after her death, he claims her property, through the medium of that person to whom he denied that she had any relation. This is in reality a claim to property under pretence of the acknowledgment of a relation, and is not legally admissible, by reason of its oppugnancy; according to the *Foosool-i-oostoorooshee*,—"A person claimed maintenance from another, alleging that he was his brother; but the relation was denied by the person from whom the maintenance was claimed. Afterwards the claimant died, and the other came forward as heir to his property on the plea that the deceased was his brother. His claim cannot be admitted; for this is not legally an acknowledgment of relation, which requires freedom from oppugnancy: it is in fact a claim to property." Besides the claimant did not content himself, in this instance, with a simple denial of the relation claimed by the deceased; but ascribed her parentage to another person, and adduced evidence in support of his allegation, and such acknowledgment is binding against the acknowledging party, in so much that, had the father of the deceased ascribed to her any other parent, his acknowledgment of that fact would have been good against him, and he would thereby have been incapacitated from again claiming her as his daughter. In the Court below, the claimant pleaded that the deceased had asserted a person to be her father who was childless, and that she had acquired the property by usurpation: he cannot now be admitted to claim the property as her lawful heir.*

CASE XIII.

Q. A marriage between two persons is alleged to have taken place, to substantiate which the following

* See Prin: Claims, &c. 22.

evidence is adduced. One man and one woman depose that they were present in the assembly at the time of the marriage ceremony. Another man and another woman depose that they heard the alleged husband acknowledge the marriage, and another man deposes to the fact of the alleged wife living with the alledged husband on terms of conjugal cohabitation. Is this evidence legally sufficient to establish the fact of the nuptials having been celebrated?

What constitutes evidence of marriage.

R. This evidence is not legally sufficient to establish the fact of the celebration of the marriage, because the several witnesses depose to different facts, and the requisite number do not combine in deposing to any particular circumstance in proof of it.*

CASE XIV.

Q. If an appellant in a suit die while it is pending and almost ready for decision, should the cause be decided in the presence of his heirs; and if the right of the respondent be established, are the heirs of the appellant answerable for the satisfaction of the judgment, or is it requisite that the respondent institute an action *de novo* against them?

An action commenced against a par-

R. The cause should be decided in the presence of the appellant's heirs, who are his successors and legal

* This question turned upon a dry point of evidence. The depositions of the witnesses would doubtless have been received as abundantly sufficient to establish the strongest presumption of marriage, so as to confer all the rights attendant on that state; but it was nevertheless not considered to afford sufficient proof of the insulated fact of the celebration of the nuptials, although taken altogether, it was enough to create the strongest probability (and sufficient for all legal purposes,) that marriage had taken place. The whole doctrine of marriages, as will be seen on reference to the principles and precedents on the subject contained in this work, favour the construction here laid down.

ty who dies before decision may be prosecuted against his heirs without any proceeding *de novo.*

representatives. If the right of the respondent be proved, and the cause of action be a specific thing, it should be delivered to him, or if it be a sum of money, it should be paid to him out of the appellant's estate. There is no necessity to institute an action *de novo* against the heirs of the appellant.

CASE XV.

Q. 1. If a woman, sitting behind a curtain, stretch forth her hand from beneath it, and sign a document, saying in the hearing of witnesses, that she had executed that document in favour of her husband, and the witnesses, when called on to prove the document, state that they attested it by desire of the woman, who was behind a curtain, whom they do not know by sight, and with the sound of whose voice even they are unacquainted, in this case, is the evidence of such witnesses legally sufficient to prove, that the woman who signed the document was in reality the wife of such person?

To prove the identity of a concealed woman it is requisite, that one of the witnesses to her signature should have seen her person.

R. 1. If any man among the witnesses saw the woman with his own eyes, and the rest were unanimously satisfied with his assurance that she was in reality the wife of such person, then their evidence will be sufficient to establish her identity, but the evidence of witnesses is not sufficient for this purpose, from the mere fact of hearing her voice, if no one of them had seen the woman.

Q. 2. Supposing that the woman who subscribed her name, while concealed behind the curtain, had been seen by only one female, and that the rest of the witnesses were satisfied by her account, of the identity of the woman, will their testimony in this case be sufficient?

R. 2. The fact cannot be proved by the evidence of witnesses who had not seen the concealed woman, and who satisfied themselves of her identity by relying on the statement of a female who had seen her; but had the witness who saw her been a male, the corroborative evidence of the rest would have sufficed.*

And that that witness be a male.

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* See Prin: Claims, &c. 9.

٢٨ و ان عجزا ولم يرض و احد منهما بدعوي الآخر تحالفا الي قوله و فسخ القاضي البيع بطلب احدهما او طلبهما و من نكل منهما لزمه دعوي الآخر * در المختار

٢٩ لا تحالف في اجل و شرط رهن او خيار او ضمان و قبض بعض ثمن و القول للمنكر بيمينه * در المختار

٣٠ و ان اختلفا اي الزوجان في قدر المهر او جنسه قضي لمن اقام البرهان و ان برهنا فللمراة اذا كان مهر المثل شاهدا للزوج بان كان كمقالته او اقل و انكان شاهدا لها بان كان كمقالتها او اكثر فبينة او لي لاثباتها خلاف الظاهر در المختار * و لو اختلفا اي الموجر و المستاجر في بدل الاجارة او في قدر المدة قبل الاستيفاء للمنفعة تحالفا وترادا و بدي بيمين المستاجر لو اختلفا في البدل و الموجر لو في المدة و لو برهنا فالبينة للموجر في البدل و للمستاجر في المدة * در المختار

٣١ قال ذواليد هذا الشي المدعي به منقولا كان او عقارا او دعنيه او اعارنيه او أجرنيه اورهننيه زيد الغايب او غصبته من الغايب و برهن عليه دفعت خصومة المدعي للملك المطلق در المختار * و اذا قال المدعي ابتعته من فلان و قال صاحب اليد او دعنيه فلان ذلك سقطت الخصومة بغير بينة * هدايه

٣٢ لا يقضي على غايب و لاله الا بحضور نايبه اي من يقوم مقام الغايب حقيقة كوكيله ووصيه و متولي الوقف الخ * در المختار

٣٣ و لو حكما رجلين لا بد من اجتماعهما لانه امر يحتاج فيه الي الراى * هدايه

دفعت اليک * فصول استروشي

٢٢ ادعي على آخر انه اخوه وطلب منه النفقة فانكر ثم مات المدعي فجاء المدعي عليه بطلب الميراث و يدعي انه اخوه لا يسمع لان هذا ليس اقرارا بالنسب حتى لا يضره بل هذا دعوي المال * فصول استروشي

٢٣ اذا ادعى رجل دارا في يد رجل انها داره ورثها من ابيه ثم ادعى انها اشتراها من ابيه في حيوته و صحته و اقام على ذلک بينة لا تقبل و بمثله ادعى الشراء اولا من ابيه في حيوته وصحته ثم ادعي الارث و اقام على ذلک بينة تقبل بينته لا في الفصل الاول اذ التوفيق بين الكلامين غير ممكن فيثبت التناقض و في الفصل الثاني التوفيق بين الكلامين ممكن فلا يثبت التناقض فتاوي حماديه

٢٤ و اذا صحت سال القاضي الخصم عنها فان اقر او انكر سال المدعي البينة فان اقام قضي عليه و ان لم يقم حلفه ان طلبه خصمه فان نكل مرة اي قال لا احلف او سكت بلا آفة و قضي بالنكول صح و عرض اليمين ثلاثا ثم القضا احوط * شرح وقايه

٢٥ اختلفا في قدر ثمن او مبيع حكم لمن برهن و ان برهنا فلمثبت الزيادة الى قواه و ان عجزا عن البينة و لم يرض واحد منهما بدعوي الآخر تحالفا و بدي بيمين المشتري * درالمختار

٢٦ و ان برهنا حكم لمثبت الزيادة و هو البايع ان كان الاختلاف في قدر الثمن و المشتري انكان الاختلاف فی قدر المبيع * شرح وقايه

٢٧ وان اختلفا فيهما اي الثمن و المبيع جميعا قدم برهان البايع لوكان الاختلاف في الثمن و برهان المشتري لو في المبيع * درالمختار

١٦ الشهادة باكثر من المدعى باطلة بخلاف الاقل للاتفاق فيه * درالمختار
١٧ و شرط موافقة الشهادة الدعوي شرح وقايه و موافقة الشهادة الدعوى معني فقط وسيتضح * درالمختار
١٨ و قبلت على الف في بالف و الف و ماية اي في شهادة احدهما بالف و الآخر بالف و ماية ان ادعي المدعي الاكثر حتى اذا ادعى الاقل بان قال لم يكن الا الالف او سكت عن دعوي المااية الزايدة لا تقبل شهادة مثبت الزيادة * شرح وقايه
١٩ و يسال القاضي المدعي عليه بعد صحتها الى قوله فان اقر فبها او انكر فبرهن المدعي قضى عليه * درالمختار
٢٠ ادعي على غيره مالا فاقر المدعي عليه بذلک الا انه بين مالا يصلح سبب الوجوب وكذبه المدعي في ذلک السبب فان اقام المدعي عليه بينة على ذلک يندفع دعوي المدعي * فتاوى حمادي
٢١ ادعي رجل مالا بحكم الشركة و جحد المدعي عليه ذلک ثم المدعي عليه قال كان في يدي من ملک كذا و كذلک بحكم الشركة و لكن قد دفعته اليک و انكر المدعي الدفع و القبض هل يحلف المدعي علي الدفع و القبض ينظر ان كان المدعي عليه انكر الشركة و كون المال في يده اصلا بان قال لم يكن بيني و بينک شركة قط و ما قبضت منک شيئا بحكم الشركة لا يحلف المدعي على القبض فان قال المدعى عليه وقت الانكار ليس في يدي من مال الشركة شيئ يحلف المدعي و هذا لان التحليف يترتب على دعوي صحيح و في الوجه الاول الدعوي لم يصح للتناقض و في الوجه الثاني صحت لعدم التناقض لانه يمكنه ان يقول ليس في يدي شيئ من مال الشركة ان

مرتدا اذا قضي به و تبطل المضاربة بموت احدهما لكونها وكالة و كذا بقتله و حجر يطرء على احدهما و بجنون احدهما مطبقا * قهستاني

٨ اعلم ان تحليف المدعي و الشاهد امر منسوخ باطل و العمل بالمنسوخ حرام * الاشباه و النظاير

٩ و لغيرها مالا او غيرمال كنكاح و رضاع و طلاق و وكالة و وصية رجلان او رجل و امرتان * شرح وقايه وهكذا في درالمختار

١٠ لا تقبل من اعمي الى قوله و مرتد و مملوك و لو مكاتبا او مبعضا و صبي و مغفل و مجنون الا في حال صحته الا ان يتحملا في الرق و التمئيز و اديا بعد الحرية و بعد البلوغ الى قوله و محدود في قذف و ان تاب * درالمختار

١١ و الزوجة لزوجها الى قوله و الفرع لاصله و ان علا الا اذا شهد الجد لابن ابنه على ابيه اشباه و بالعكس للتهمة و سيد لعبده و مكاتبه * درالمختار

١٢ والشريك لشريكه فيماهومن شركتها * درالمختاروهكذا في شرح الوقايه

١٣ و للولادة و استهلال الصبي للصلوة عليه و البكارة و عيوب النسا فيما لا يطلع عليه الرجال امراة حرة مسلمة * در المختار

١٤ و لا يشهد احد بما لم يعاينه بالاجماع الا في النسب و الموت و النكاح و الدخول بزوجته و ولاية القاضي واصل الوقف * درالمختار

١٥ الاصل ان الترجيح لا يقع بكثرة العلل حتى لا يترجح القياس بقياس آخر و لا الحديث بحديث آخر فلا ترجيح بزيادة عدد الشهود حتى لو اقام احد المدعيين شاهدين و الآخر اربعة فهما سواء * اصول الرضا في باب ما مدعيه الرجلان

الباب الاثني عشر في الدعاوي و القضاء

١ الحق لا يسقط بتقادم الزمان قذفا او قصاصا او لعانا او حقا
لعبد كذا في لعان الجوهرة * الاشباه و النظائر

٢ لا يعتمد على الخط و لا يعمل به فلا يعمل بمكتوب الواقف
الذي عليه خطوط القضاة الماضين لان القاضي لا يقضي
الا بالحجة و هي البينة او الاقرار او النكول كما في
وقف الخانية * الاشباه والنظاير

٣ و لو احضر المدعي خط اقرار المدعي عليه لا يحلف انه ماكتب
و انما يحلف على اصل المال كما في قضايا الخانيه * الاشباه والنظاير

٤ و ان اقام الخارجان البينة على الملك و التاريخ فصاحب
التاريخ الاقدم اولى لانه اثبت انه اول المالكين فلا يتلقي
الملك الا من جهته و لم يتلق الآخر منه * هدايه

٥ و الشراء احق من هبة و صدقة و رهن و لو مع قبض و هذا
ان لم يورّخا * درالمختار

٦ و اما خيار العيب و التعئين لفوات الوصف المرغوب فيه
فيخلفه الوارث فيهما درالمختار * و تنفسخ الاجارة بموت
احد العاقدين عقدها لنفسه فان عقد لغيره فلا كالوكيل
و الوصي و متولي الوقف * شرح وقايه

٧ تبطل الشركة اي شركة العقد بموت احدهما علم الآخر اولا لانه عزل
و لو حكما بان قضي بلحاقه مرتدا درالمختار و في شرح الوقاية
تبطل الشركة بموت احد الشريكين و لحاقه بدارالحرب

مشروطا في عقد الرهن * عالم گيري

۱۷ على المرتهن مؤنة الحفظ كاجر بيت الحفظ و اجر الحافظ و على الراهن مؤنة تبقيته و اصلاح منافعه كنفقة رهنه و كسوته و اجر راعيه * شرح وقايه

۱۸ فان ركب المرتهن الدابة او كان عبدا فاستخدمه او ثوبا فلبسه او سيفا فتقلده بغير اذن الراهن فهو ضامن له لانه يستعمل ملكه بغير اذنه فيكون كالغاصب * عالم گيري

۱۹ و هو مضمون بالاقل من قيمته و من الدين فاذا هلك في يد المرتهن و قيمته و قيمة الدين سواء صار المرتهن مستوفيا لدينه و ان كانت قيمة الرهن اكثر فالفضل امانة لان المضمون بقدر ما يقع به الاستيفاء و ذاك بقدر الدين فان كانت اقل سقط من الدين بقدره و رجع المرتهن بالفضل * هدايه

۲۰ اذا مات الراهن و عليه ديون كثيرة فالمرتهن احق بالرهن و للمرتهن امساك الرهن بالدين الذي ارتهن به * عالم گيري

١٠ ولا يحبسه في ما سوي ذلك اذا قال اني فقير الا ان يثبت غريمه ان له مالا فيحبسه * هدايه

١١ ثم اختلف الروايات في تقدير تلك المدة و الصحيح انه مفوض الى راي القاضي * عالم گيري

١٢ و بعد ما خلي سبيله هل لصاحب الدين ان يلازمه اختلفوا فيه و الصحيح ان له ان يلازمه ثم اذا ثبت عسرته فالقاضي يحبسه بعد ذلك مالم يعرف له مالا * عالم گيري

١٣ اذا امتنع عن قضاء الدين و له مال فان كان ماله من جنس الدين بان كان ما له دراهم و الدين دراهم فالقاضي يقضي دينه من دراهم بلاخلاف و ان كان ما له من خلاف جنس دينه بان كان الدين دراهم و ماله عروض او عقار او دنانير فعلي قول ابي حنيفة رح لا يبيع العروض و العقار و بيع الدنانير استحسان و لكن يستديم حبسه الى ان يبيع بنفسه و يقضي الدين و عندهما يبيع القاضي دنانيره و عروضه في رواية واحدة و في العقار روايتان و في الخانية في رواية يبيع المنقول و هو الصحيح و يكون البيع بيع الدنانير اولا ثم العروض ثم و ثم و يقضي دينه * عالم گيري

١٤ ما يجوز بيعه يجوز رهنه و مالا يجوز بيعه لا يجوز رهنه * عالمگيري

١٥ و ينعقد بايجاب و قبول غير لازم فاذا سلم فقبض محوزا مفرغا متميز الزم * وقايه

١٦ ان كل تصرف يزيل العين عن ملك الراهن كالبيع و الاجارة فذلك ليس بمملوك للمرتهن و لو فعل يضمن و ان كان فيه تحصن و حفظ من الفساد الا اذا كان ذلك بامر القاضي او كان

شاوًا بجميع الدين لان كل واحد منهما كفيل عن صاحبه على ما عرف في الشركة و اما شركة العنان فتنعقد على الوكالة دون الكفالة و هي ان يشترك اثنان في نوع بز او طعام او يشترك في عموم التجارات ولا يذكر ان الكفالة * هدايه

٦ و لو استدان الوصي النفقة و الكسوة لاجل اليتيم اورهن شيئا جاز لان في الرهن قضاء الدين و هو يملك ذلك * فصول عمادي

٧ ولا يحجر حر مكلف بسفه و فسق و دين هذا عند ابي حنيفه رح و اما عندهما و عند الشافعي رح يحجر على السفيه و ايضا اذا طلب غرماء المفلس الحجر عليه يحجر القاضي و يمنعه عن البيع و الاقرار * شرح وقايه

٨ اذا جاء رجل برجل الى القاضي و اثبت عليه ماله ببينة او اقر الرجل له فالقاضي لا يحبسه من غير سوال المدعي هذا مذهبنا و اذا سال المدعي ذلك ذكر في كتاب الا قضية ان القاضي لا يحبسه في اول الو هلة لكن يقول له قم فارضه فان عاد مرة اخرى حبسه ولم يفصل بين الدين الثابت بالاقرار و بين الدين الثابت بالبينة و هو اختيار الخصاف و المذهب عندنا ان في فصل البينة يحبس في اول الو هلة و في فصل الاقرار لا يحبس في اول الو هلة * عالم گيري

٩ فان امتنع حبسه في كل دين لزمه بدلاعن مال حصل في يده كثمن المبيع او التزمه بعقد كالمهر و الكفالة لانه اذا حصل في يده ثبت غناه به و اقدامه على التزامه باختياره دليل يساره اذ هو لا يلتزم الا ما يقدر على ادائه و المراد بالمهر معجله دون موجله * هدايه

الباب الحادى عشر في مسائل الديون و الضمان

١ رجل مات و عليه دين و علم الوارث بدين المورث كان عليه ان يقضي بدينه من تركة المورث * عالم گيري

٢ دين الصحة مقدم على دين المرض الثابت باقراره و هو ان يقضي من التركة او لا دين الصحة فان فضل شيئ يصرف على دين المرض و اذا ثبت الدين بالبينة او بمشاهدة القاضي فهما سواء و اقرار المريض لوارثه لا يجوز الا باجازة بقية الورثة * عالم گيري

٣ و ما اشتراه كل واحد منهما للشركة طولب بثمنه دون الاخر لما بينا انه يتضمن الوكالة دون الكفالة و الوكيل هو الاصيل في الحقوق هدايه * رجلان اشتريا عبدا او استقرضا مالا من رجل على ان كل واحد من هما كفيل عن صاحبه كان للبائع ان ياخذ اي هما شاء بجميع الالف * عالم گيري

٤ و اذا كفل رجلان عن رجل بمال على ان كل واحد من هما كفيل عن صاحبه فكل شيئ اداه احد هما رجع على صاحبه بنصفه قليلا كان او كثيرا و معنى المسئلة في الصحيح ان يكون الكفالة بالكل عن الاصيل و بالكل عن الشريك و المطالبة متعددة فيجتمع الكفالتان و اذا ابرأ رب المال احد هما اخذ الآخر بالجميع لان ابراء الكفيل لا يوجب ابراء الاصيل فبقي المال كله على الاصيل و الآخر كفيل بكله * هدايه

٥ و اذا افترق المتفاوضان فلاصحاب الديون ان ياخذوا اي هما

سنة او كان الزيادة انفع للفقراء فللقاضي المخالفة دون الناظر
شرط الواقف ان يتصدق بفاضل الغلة على من يسال في مسجد
كذا كل يوم كذا لم يراع شرطه فللقيم التصدق على سائل
غير ذلك المسجد او على خارج المسجد او على من لا يسال
لو شرط للمستحقين خبزا و لحما معينا كل يوم فالمقيم ان
يدفع القيمة من النقد يجوز الزيادة من القاضي على معلوم
الامام اذا كان لا يكفيه و كان عالما تقيا شرط الواقف عدم
الاستبدال فللقاضي الاستبدال اذا كان اصلح * اشباه و نظائر

٩ و ما شرطه الواقف لاثنين ليس لاحدهما الانفراد الا اذا شرط
الواقف الاستبدال لنفسه و الآخر فان للواقف الانفراد
لالفلان * في فتاوي قاضي خان

١٠ او قاف الامراء و السلاطين كلها ان كان لها اصل من بيت
المال ويرجع اليه فيجوز لمن كان بصفة الاستحقاق من عالم للعلوم
الشرعية و طالب العلوم و كذ لك صوفي على طريقة صوفية
اهل السنة و الجماعة ان ياكل مما و تفوه غير مقيد بما شرطوه
و لا يولى الا امين قادر بنفسه او بنايبه و ان كان الوقف ليس
ماخوذا من بيت المال اتبع فيه شرط الواقف * في عالمگيري

٥ و لو ان الواقف شرط الولاية لنفسه و كان الواقف غير ما مون
على الوقف فللقاضي ان ينزعها من يده عالمگيري* وقف ضيعة
له و اخرجها من يده الى قيم ثم اراد ان يا خذها من يده
فان كان شرط لنفسه في الوقف ان له العزل و الاخراج من
يدالقيم كان له ذلك * عالم گيري
٦ للمتولي ان يفوض بغيره عند موته * في فتح القدير
٧ اجمعوا على ان الواقف اذا شرط الاستبدال لنفسه في اصل
الوقف يصح الشرط و الوقف و يملك الاستبدال اما بدون
الشرط اشار في السير الى انه لا يملك الاستبدال الا القاضي
اذا راي المصلحة في ذلك و كذلك ارض الوقف اذا قل
نزلها لافة و صار بحيث لا تصلح للزراعة او لا يفضل غلتها
عن مونتها و يكون صلاح الوقف في الاستبدال بارض اخري
فيصح شرط و لاية الاستبدال و ان لم يكن للحال ضرورة داعية
الى الاستبدال في فتاوي قاضيخان * اجارة الوقف باقل
من اجرة المثل لا يجوز اذا كان لايرغب احد في اجارتها الا
باقل فيما اذا كان النقصان يسيرا و كان القاضي الامام
ابوعلي النسفي رح يفتي بان المتولى لا ينبغي له ان يواجر
اكثر من ثلث سنين و لوآخر جازت الاجارة و هذا قريب
بما هو المختار لان فعله يدل على روية المصلحة * عالم گيري
٨ شرط الواقف يجب اتباعه لقولهم شرط الواقف كنص
الشارع اي في وجوب العمل به الا في مسائل الاولى شرط
ان القاضي لا يعزل الناظر فله عزل غير الاهل الثانية شرط ان
لا يوجر وقفه اكثر من سنة و الناس لا يرغبون في استيجارة

الاجر فيكون الاجر له و لو بلغ الصبي في هذا كله قبل انقضاء مدة الاجارة فله الخيار ان شاء امضى الاجازة و ان شاء فسخ * عالمگيري

الباب العاشر في مسايل الوقف

١ الوقف عندهما حبس العين على حكم ملك الله تعالى على وجه يعود منفعته الى العباد * في الهداية

٢ و لا يباع و لا يوهب و لا يورث في عالمگيري * و ما كان في حالة المرض فحكمه حكم الوقف في الصحة و ان كان يعتبر من الثلث كالهبة في المرض يعتبر ن الثلث في فتاوي قاضيخان * و صح عند ابي يوسف رح وقف المشاع* في عالمگيري

٣ و ما انهدم من بناء الوقف و آلته صرفه الحاكم في عمارة الوقف ان احتاج اليه و ان استغني عنه امسكه حتى يحتاج الى عمارته فيصرفه فيها و ان تعذر الى موضعه يبيع و يصرف ثمنه الى المرمة * عالم گيري

٤ و لو قال ارضي هذه صدقة موقوفة على من يحدث لي من الولد و ليس له ولد يصح هذا الوقف فان حدث له ولد يصرف الغلة اللتي توجد بعد ذلک الى هذا الولد ما يبقى هذا الولد فان لم يبق واحد من ذلک يصرف الغلة الى الفقراء * عالم گيري

و لا عاشرا و لا قاسما و لا اميناً لحاكم و لا اماما اعظم و لا قاضيا
و لا وليا في نكاح او قود و لا وصيا الا اذا كان عبدا للموصى
و الورثة صغارا و لا يرث و لا يورث و كذا وصيته و هبته
و صدقته و تبرعه * عالم گيري

١٢ و لا يسمع الدعوي و الشهادة عليه الا بحضور سيده و لا
يوضع الجزية على المملوك و المكاتب و المدبر و ام الولد
و لا يودي عنهم مواليهم في الهدايه * و لا يحبس في دين
و كذا اقراره في الجناية موجب للدفع او الفداء و لا
عاقلة له و لا منه و لا تجب عليه نفقة و لده * اشباه و نظاير

١٣ و ان اذن للعبد اذنا عاما جاز تصرفه في ساير التجارات فان
اذن له في نوع منها دون غيره فهو ماذون في جميعها* عالمگيري

١٤ و يجبر على التزويج و يباع في نفقة زوجته و مهرها متعلق
برقبته كالدين ولا تنكح على حرة ولا يصح نكاح امته و سيدته*وقايه

١٥ شراء القريب اعتاق * شرح وقايه

١٦ و الولد يتبع امه في الملك و الرق في وقايه * اي ان كانت
الام في ملك زيد فالولد المولود في ملك زيد يكون
ملكا له * شرح وقايه

١٧ لا يجوز بيع الحر الا ان يعجز عن اداء مال و جب في ذمته
او هو مضطر وقع في مهلكة لا يري بقاء حيوته الا ان يبيع
نفسه او في مخمصة يحل له الجيفة فبيعه نفسه اولى من
اكل الجيفة * في المحيط

١٨ و الحر اذا قال بعت نفسي شهرا بكذا فهو اجارة صحيحة وكذا
لو آجر الصبي المحجور نفسه و سلم و عمل و سلم العمل يستحق

مطلق و مقيد فالمطلق ما علق عتقه بموته من غير انضمام
شئي آخر اليه * في الينابيع

٧ و حكم المطلق اذا كان حيا لا يجوز بيعه و لا هبته و للمولى
ان يستخدمه و يوجره و ان كانت امة وطيها و له ان يزوجها
اما المقيد فهو ان يعلق عتق عبده بموته موصوفا بصفة
او بموته و شرط آخر نحو ان يقول ان مت من مرضي هذا
او من سفري هذا فانت حر او نحو ذلك فهذا مدبر مقيد
و حكمه اذا مات على تلك الصفة كما في المحلى في ... ات
للمولى ان يتصرف فيه بجميع التصرفات من البيع
و التمليك و غيرهما * عالم گيري

٨ فان مات المولى عتق المدبر من ثلث ماله حتى لو لم يكن
له مال غيره يسعي في ثلثيه و اذا كان على المولى دين مستغرق
لرقبته يسعى في جميع قيمته لغرماء المولى * عالم گيری

٩ امةٌ ولدت من سيدها او من زوج فملكها صارت
ام ولد * في وقايه

١٠ و لا يجوز بيع ام الولد و كذلك كل تصرف يوجب بطلان حق
الحرية الثابت بالاستيلاد لا يجوز كالهبة و الصدقة و غيرها و
ما لا يوجب بطلان هذا الحق فهو جايز كالاجارة و الاستخدام
و اذا مات مولى ام الولد عتقت لكن عتقها يعتبر من
جميع المال سواء خرجت من الثلث او لم يخرج و لم
يلزم السعاية عليها لا لغريم و لا لوارث * عالم گيري

١١ و لا ينفرد بتزويج نفسه و لا يجوز قول العبد شاهدا و لا ينفذ
اقراره بمال الا باذن مولاه و لا يجوز كون العبد مزكيا علانية

الباب التاسع في مسائل الرقية

١ اذا فتح الامام بلدة من بلاد اهل الحرب عنوة فهو في الاسارى بالخيار ان شاء قتلهم و ان شاء استرقهم هدايه * و لو دخل دارهم مسلم بامان ثم اشترى من بعضهم ابنه ثم اخرجه الى دار الاسلام قهرا ملكه و اكثر المشايخ على انه لا يملكه في دارهم و هو الصحيح * جامع الرموز

٢ الرق وافرا كان اى كاملا كالقن * في السراجيه

٣ او ناقصا كالمدبر و المكاتب و ام الولد * في السراجيه

٤ اما تفسيرها اى الكتابة فهو تحرير المملوك يدا في الحال و رقبته في المال في التبيين * اما الايجاب فهو اللفظ الدال على الكتابة نحو قول المولى كاتبتك على كذا و نحوه و اما القبول فهو ان يقول قبلت او رضيت او ما اشبه ذلك فاذا وجد الايجاب و القبول فقدتم في البدائع * و ان كان البدل حالا او منجما او غير منجم عندنا * في فتاوي قاضي خان

٥ و لا يعتق الا باداء جميع المال فاذا اداه عتق في خزانة المفتيين* و ان عجز يرد الى الرق شرح وقايه * و خرج من يده دون ملكه في الوقايه * و المدبر و المكاتب لا يحتملان النقل من ملك الى ملك مع بقاء الكتابة و التدبير * في الهدايه

٦ و من اعتق عن دبر مطلقا باذامت فانت حر او انت حر عن دبر مني او انت مدبر او دبرتك او ان مت الى ماية سنة و غلب موته قبلها فمدبر في الوقايه * التدبير على نوعين

توجهت المطالبة اليه من قبل الموصي فلم يكن في القضاء متبرعا وكذلك في شراء الكسوة و النفقة للصغير * محيط سرخسي

١٢ والصبي لو طلق امرأته او اعتق عبده او وهب ماله لا يصح سواء اذن له ابوه في ذلك او لم ياذن * قاضيخان

١٣ من وهب بصبي شيئا فقبضه الصبي بنفسه جاز * فصول عمادية

١٤ لا يجوز للوصي بيع عقار اليتيم عند المتقدمين و منعه المتاخرون ايضا الا في ثلث كما ذكره الزيلعي اذا بيع بضعف قيمته و فيما احتاج اليتيم الى النفقة ولا مال له سواه و فيما اذا كان على الميت دين لا وفاء الا منه وزدت اربعة فصار المستثني سبعة ثلثة من الظهيرية فيما اذا كان في التركة وصية مرسلة لا نفاذ لها الا منه و فيما اذاكانت غلاته لا يزيد على مؤنته و فيما اذا كان حانوتا او دارا يخشى عليه النقصان انتهي والرابعة من بيوع الخاينة فيما اذا كان العقار في يد متغلب و خاف الوصي عليه فله بيعه * اشباه و نظاير

١٥ و ان كان بيعهم و اجارتهم بمثل قيمته او اكثر او باقل قدر ما يتغابن الناس في مثله جاز و ان كان قدر ما لا يتغابن الناس فيه لا يجوز في الحمادى

١٦ و الحجر عليه في الاقوال كلها لا في الافعال فيضمن ما اتلفه ولا قصاص عليه و يقام التعزير عليه تاديبا اشباه و نظاير

٦ فلهولاء كلهم ولاية التجارة بالمعروف في مال الصغير و الصغيرة و لهم ولاية الاجارة فى النفس والمال جميعافي المنقولات و العقارات فان لم يكن فالقاضي و من نصبه القاضي فلهولاء كلهم ولاية التجارة بالمعروف في مال الصغير * في الحمادية

٧ و عند عدم العصبة كل قريب يرث الصغير و الصغيرة من ذوي الارحام يملك تزويجها في ظاهر الرواية عن ابي حنيفة رح * في الحماديه

٨ و الام و الجدة احق بالغلام حتى يستغنى و قدربسبع سنين و قال القدوري حتى يا كل و يشرب وحده و يستنجي وحده و قدره ابوبكر الرازي بتسع سنين و الفتوى على الاول و الام والجدة احق بالجارية حتى تحيض و في نوادر هشام عن محمد رح اذا بلغت حد الشهوة فالاب احق و هذا صحيح * في التبيين

٩ وانما يبطل حق الحضانة لهولاء النسوة بالتزوج اذا تزوجت باجنبي فان تزوجت بذي رحم محرم من الصغيرة كالجدة اذا كان زوجها جد الصغيرة اوالام اذا تزوجت بعم الصغير لا يبطل حقها في فتاوي قاضي خان * و من سقط حقها بالتزوج يعود اذا ارتفعت الزوجية * في الهداية

١٠ الولي العصبة على ترتيبهم * عالم گيري

١١ لو اشتري الوصي الوارث الكفن و نقد الثمن من ماله يرجع كالوكيل بالشراء لان شراء الكفن مستحق عليه لانه مطالب به فاذا فعل لم يكن متبرعا فيما صنع و تصرف من غير بينة و كذلك لوقضي دينا بشهود لانه كان مطالبا لقضايه و انما

الباب الثامن في مسائل الاولياء و الصغار

١ بلوغ الغلام بالاحتلام و الجارية بالاحتلام و الحيض فان لم يوجد شئي من هذه العلامات في الغلام و الجارية فلا يحكم ببلوغهما حتى يتم لهما خمس عشر سنة كماهو المشهور المتعارف بين الناس و هذا عند ابي يوسف و محمد رح وهو رواية عن ابي حنيفه و به يفتى * في الكافي

٢ صبي اقراره بالغ و قاسم الوصي فان كان بالغا جازت قسمته و لم يقبل قوله بعد ذلك انه كان غير بالغ و ان يكن مراهقا و يعلم ان مثله لا يحتلم لم يجز قسمته و لم يقبل قوله انه بالغ فصول عماديه * و هو جنين مادام في بطن امه فاذا انفصل ذكرا فصبي ويسمى رجلا كما في اية الميراث الى البلوغ فغلام الى تسع عشر سنة فشاب الى اربع و ثلثين فكهل الى احد و خمسين فشيخ الى آخر عمره هكذا في اللغة * اشباه ونظاير

٣ فلا تكليف عليه بشيئ من العبادات حتى الزكوة عندنا وغيرها * اشباه و نظائر

٤ اما ولاية المصالح فالى الاب ان كان حيا و ان كان ميتا فالوصى الذي جعله الاب وصيا ثم الى وصي وصيه * فصول عمادي

٥ الولاية على الصغير و الصغيرة المغير في احد الامرين اما في المصالح او في المناكح اما ولاية المناكحة فموضعها كتاب النكاح اما ولاية المصالح فالى الاب ان كان حيا و ان كان ميتا فالوصي الذي جعله الاب وصيا ثم الى وصي وصيه في العماديه

تطليقة باينة و لزمها المال كلها * عالمكيري

٢٩ و من قذف بالزنا زوجته العفيفة و كل منهما صلح شاهدا او نفي نسب ولدها و طالبه به اي موجب القذف و هو الحد لا عن فان ابي حبس حتى يلاعن او يكذب نفسه فيحد فان لاعن لاعنت و الا حبست حتى تلاعن او تصدقه فينفى نسب ولدها * وقايه

٣٠ ان اقر انه لم يصل اليها اجله الحاكم سنة قمرية فان لم يصل فيها فرق القاضي بينهما ان طلبته * وقايه

٣١ و يثبت نسب ولد منكوحة اتت به بستة اشهر وقايه * و لو طلقها بعد الدخول ثم جاءت بولد يثبت النسب الى سنتين و لو مات عنها قبل الدخول او بعده ثم جاءت بولد من وقت الوفاة الى سنتين يثبت النسب منه * عالمگيري

٣٢ الامة اذا جاءت بولد لا يثبت النسب لولدها بدون الدعوة و ام الولد الحكم فيها ان يثبت النسب من غير دعوة * في الظهرية

٣٣ و لو اقر ببنوة غلام جهل نسبه و يولد مثله بمثله و صدقه الغلام ثبت نسبه و لو في مرض و شارك الورثة * عالمگيري

و عقلا و دينا و بكارة * في التبيين

٢٢ اما اذا كان بشرط التعجيل او مسكوتاً عنه فانه يجب في الحال معجلا لان هذا عقد معاوضة فيقتضي المساواة في الجانبين * حماديه

٢٣ فيحرم من الرضاع ما يحرم من النسب الا ام اخته و اخيه و اخت ابنه و جدة ابنه و ام عمه و عمته و ام خاله و خالته للرجل * شرح وقايه

٢٤ و يقع طلاق كل زوج عاقل بالغ حر او عبد و لو سكران وقاية الروايه * و حسنه وهو السني طلقةٌ لغير الموطؤة و لو في حيض و للموطؤة تفريق الثلث في اطهار لا وطي فيها في من تحيض و اشهر في غيرها الرجعة في العدة لا بعدها لمن طلقت دون ثلث اى في الحرة بنحو راجعتك و بوطيها و مس بشهوة * شرح وقايه

٢٥ لاتحل حرة بعد ثلث ولا امة بعد ثنتين حتى يطاء ها غيره بنكاح صحيح و تمضى عدة طلاقه او موته * وقايه

٢٦ و لو طلقها طلاقا باينا او ثلاثا ثم مات و هي في العدة عندنا ترث * في المحيط

٢٧ فلو قال و الله لا اقربك او لا اقربك اربعة اشهر الاول موبد و الثاني موقت باربعة اشهر فقد الي فان اقربها في المدة حنث و تجب الكفارة في الحلف بالله و في غيره الجزاء و سقط الايلاء و الا بانت بواحدة في وقايه * و ايضا فيها و حكمه طلقة بانية ان برو الكفارة و الجزاء ان حنث *

٢٨ اذا تشاقا الزوجان و خافا ان لا يقيما حدود الله فلا باس بان يفتدي نفسها منه بمال يخلعها به فاذا فعلا ذلك وقع

١٤ نفذ نكاح حرة مكلفة بلا ولي عند ابى حنيفة و ابي يوسف رح في ظاهر الرواية في التبيين * وللولى الاعتراض في غير الكفو * شرح وقايه

١٥ وبقي الخيار للاولياء في التفريق لعدم الكفاءة * في السراج الوهاج

١٦ لولي الصغير و الصغيرة ان ينكحهما و ان لم يرضيا بذلك * في العيني شرح الكنز

١٧ اما اذا ولدت منه فليس للاولياء حق الفسخ * في العناية

١٨ فان زوجهما الاب و الجد يعني الصغير و الصغيرة فلا خيار لهما بعد البلوغ و ان زوجهما غير الاب و الجد فلكل واحد منهما الخيار اذا بلغ ان شاء قام على النكاح و ان شاء فسخ هذا عند ابي حنيفة و محمد رح ثم عند هما اذا بلغت الصغيرة و قد علمت بالنكاح فسكتت فهو رضاء * بضاعة المفتيين

١٩ و عند عدم العصبة كل قريب يرث الصغير و الصغيرة من ذوي الارحام يملك تزويجهما في ظاهر الرواية ثم مولى الموالاة ثم السلطان ثم القاضي و من نصبه القاضي * في المحيط

٢٠ ثم المهر واجب شرعا ابانة لشرف المحل فلا يحتاج الي ذكره لصحة النكاح هدايه * اقل المهر عشرة دراهم مضروبة او غير مضروبة في التبيين * و المهر يتاكد باحد معان ثلثة الدخول و الخلوة الصحيحة و موت احد الزوجين * في البدايع

٢١ و ان تزوجها و لم يسم لها مهرا او تزوجها على ان لا مهر لها فلها مهر مثلها ان دخل بها او مات عنها بضاعة المفتيين* ومهر مثلها يعتبر بقوم ابيها اذا استوتا سنا و جمالا و بلدا و عصرا

المجلس من حيث المعني * في البدايع

٧ واما احكامه فحل استمتاع كل منهما بالآخر على وجه الماذون فيه شرعا في فتح القدير * و ملك الحبس و هو صيرورتها ممنوعة عن الخروج و البروز ووجوب المهر والنفقة و الكسوة عليه و حرمة المصاهرة و الارث من الجانبين و وجوب العدل بين النساء و حقوقهن و وجوب الاطاعة عليها اذا دعاها الى الفراش و ولاية تاديبها اذا لم تطعه بان نشزت * بحر الرايق

٨ لا يحل للرجل ان يجمع بين اكثر من اربع نسوة في المحيط السرخسي * ولا يجوز للعبد ان يتزوج اكثر من ثنتين * في البدايع

٩ وحرم على المرء اصله و فرعه واخته و بنتها و بنت اخيه و عمته و خالته و بنت زوجة وطيت و ام زوجته و ان لم تكن توطاء و زوجة اصله و فرعه و كل هذه رضاعا * في شرح الوقاية

١٠ الاصل ان كل امرء تين لوصورنا احدهما من ايّ جانب ذكرا لم يجز النكاح بينهما برضاع اونسب لم يجز الجمع بينهما * في المحيط

١١ لا نكاح امته و امة على حرة و صح نكاح الامة المسلمة و لو مع طول الحرة شرح وقاية * لا يصح نكاح المملوك الا باذن المولى * قاضي خان

١٢ يجوز تزويج الكتابيات و الصابيات ان كانوا يؤمنون بدين نبي و يقرون بكتاب لانهم من اهل الكتاب * بضاعة المفتيين

١٣ يشهد رائي رجل و امرءة يسكنان بيتا و بينهما انبساط الازواج انها عرسه و غاية الرواية * ولا ينعقد نكاح المسلمين الا بحضور شاهدين حرين عاقلين بالغين * بضاعة المفتيين

الباب السابع في مسائل النكاح والمهر و الطلاق والنسب

١ اما تفسيره فهو عقد يرد على ملك المتعة قصدا * في الكنز

٢ اما ركنه فا لايجاب والقبول * في الكافي

٣ اما شروطه فمنها العقل و البلوغ و الحرية في العاقد الا ان الاول شرط الانعقاد فلا ينعقد نكاح المجنون و الصبي الذي لا يعقل و الآخران شرطا نفاذه فان نكاح الصبي العاقل يتوقف نفاذه على اجازة وليه في البدايع * و منها المحل القابل و هي المرءة التي احلها الشرع بالنكاح في النهاية * و منها سماع كل من العاقدين كلام صاحبه في فتاوي قاضي خان * و منها الشهادة قال عامة العلماء انها شرط جواز النكاح و منها سماع الشاهدين كلامهما معا * في فتح القدير

٤ و شرط في الشاهد اربعة امور الحرية و العقل و البلوغ و الاسلام * عالم كيري

٥ و يصح بشهادة الفاسقين فتاوي قاضي خان * و ينعقد بحضور من لا تقبل شهادته كما اذا تزوج امرءة بشهادة ابنه منها و كذا اذا تزوج بشهادة ابنه لا منها او ابنها لا منه * في البدايع

٦ و لو ارسل اليها رسولا او كتب اليها بذلك كتابا فقبلت بحضرة شاهدين سمعا كلام الرسول او قرأة الكتابة جاز لاتحاد

الوصية و نصب غيرهم و قيل في الكافر باطل ايضا لعدم ولايته
على المسلم * هدايه

١٧ و من اوصى الى رجل فقبل الوصي في وجه الموصي و ردها في
غير وجهه فليس يرد لان الميت مضى بسبيله معتمدا عليه
فلو صح رده في غير وجهه في حيوته او بعد مماته صار مغرورا
من جهته فرد رده * هدايه

١٨ و من اوصى الى اثنين لم يكن لاحدهما ان يتصرف عند ابي
حنيفة و محمد رح دون صاحبه الا في اشياء معدودة في شراء
الكفن و تجهيزه و طعام الصغار و كسوتهم و رد الوديعة بعينها
و رد المغصوب و المشتري شراء فاسدا و حفظ الاموال و قضاء
الديون و تنفيذ و صية بعينها و عتق عبد بعينه و الخصومة
في حق الميت و قبول الهبة و قبول بيع ما يخشي عليه التوي
و التلف و جمع الاموال الضائعة و في الجامع الصغير ليس لاحد
الوصيين ان يبيع او يتقاضى* هدايه

لانه تمليک مضاف الى ما بعد الموت و حكمه يثبت
بعد الموت * عالمگیری

١١ كل تصرف اوجب زوال ملک الموصي فهو رجوع كما اذا باع
العين الموصى به ثم اشتراه او وهبه ثم رجع فيه لان الوصية
لا تنفذ الا في ملكه فاذا ازاله كان رجوعا و لو قال العبد الذي
اوصيت به لفلان فهو لفلان كان رجوعا لان اللفظ يدل على
قطع الشركة * هدايه

١٢ و من اوصى لرجل بثلث ماله ولآخر بثلث و لم تجز الورثة
فالثلث بينهما لانه يضيق الثلث عن حقهما اذ لايزاد عليه
عند عدم الاجازة لما تقدم و قد تساويا في سبب الاستحقاق
و المحل يقبل الشركة في كونه بينهما * هدايه

١٣ و من قال سدس مالي لفلان ثم قال في ذلک المجلس او في
مجلس آخر له ثلث مالي و اجازته الورثة فله ثلث المال
فيدخل السدس فيه و من قال ثلث مالي لفلان ثم قال في
ذلک المجلس او في غيره سدس مالي لفلان فله سدس
واحد * هدايه

١٤ و من اوصى لزيد ولعمرو بثلث ماله فاذا عمرو ميت فالثلث
كله لزيد و ان قال ثلث ماله بين زيد و عمرو و زيد ميت
فالنصف لعمرو * هدايه

١٥ الولاية في مال الصغير الى الاب و وصيه ثم الى وصي وصيه
فان مات الاب ولم يوص الى احد فالولاية الى الجد و هو
اب الاب ثم الى وصيه ثم الى وصي وصيه * حماديه

١٦ و من اوصى الى عبد او كافر او فاسق اخرجهم القاضي عن

الباب السادس في مسائل الوصية

۱ اعلم ان الوصية ايجاب الملك بعد الموت * حماديه

۲ و لا يجوز بما زاد على الثلث الا ان يجيزها الورثة بعد موته * هدايه

۳ و لا يجوز لوارثه الا ان يجيزها الورثة * هدايه

۴ اعلم ان الوصية ايجاب الملك بعد الموت كالميراث الا ان الفرق وقع بينهما ان الميراث يدخل في ملك الوارث من غير قبول و الوصية لا تدخل في ملك الموصى له من غير قبول و القبول على ضربين قبول بالتصريح و قبول بالدليل * حماديه

۵ ثم تنفذ وصاياه في ثلث ما بقي بعد الدين ثم يقسم الباقي بين ورثته * سراجيه

۶ تتعلق بتركة الميت حقوق اربعة مترتبة الاول يبدء بتجهيزه و تكفينه بلا تبذير و لا تقتير ثم تقضى ديونه من جميع ما بقي من ماله * حماديه

۷ و لو اقر المريض لوارثه لا يصح الا ان يصدقه فيه بقية الورثة * هدايه

۸ قال ثلث مالي و لا مال للموصي فاكتسب مالا فللموصي له ثلث ما للموصي عند موته * شرح وقايه

۹ و ان اوصي لاحدهما بجميع ماله و لاخر بثلث ماله و لم تجز الورثة فالثلث بينهما على اربعة سهم * هدايه

۱۰ و يعتبر كونه وارثا او غير وارث وقت الموت لا وقت الوصية

ابي يوسف رح و هو الصحيح لان شرط قبض الواهب و كون الدار مشغولة بمتاع الواهب او بسكناه لا يمنع قبض الواهب و انما يمنع قبض غيره و لو وهبت المراة دارها من زوجها و هي ساكنة فيها و لهذا متعة فيها او الزوج ساكن معها يصح * محيط سرخسي

١٠ لو وهب الوديعة من المودع او العارية من المستعير جاز و كفاه ذلك القبض و لو قبض الاخ او الجد او العم فلا يخلو اما ان يكون حيا او ميتا فان كان حيا جاز فيقيم عن الصغير لان الولاية انتقلت اليه * محيط سرخسي

١١ لا يجوز هبة المريض الا مقبوضة فاذا قبضت فجرت من الثلث * عالمگيري

لا يجوز لوارثه الا ان يجيزها الورثة * هدايه

١٢ و من وهب و رجع صح * شرح وقايه

١٣ و متعه الزيادة متصلة لا منفصلة و موت احد العاقدين و عوض اضيف اليها ولو من اجنبي و خروجها عن ملك الموهوب له و الزوجية وقت الهبة و قرابة المحرمية و هلاک الموهوب * شرح وقايه

١٤ عن الناطقي الهبة على وجهين على شرط و على غير شرط * بضاعة المفتيين

١٥ و اجمعوا على انه لو قال وهبت هذا لک بكذا انه بيع * بضاعة المفتيين

١٦ قال مفتي الثقلين الهبة بشرط العوض هبة ابتداء فيشترطالتقابض في العوضين و بعد التقابض يثبت لها حكمالبيع * بضاعةالمفتيين

٥ و شرطه ان يكون موجودا وقت الهبة ولا يجوز هبة ما ليس بموجود وقت العقد بان وهب ما يثمر نخيله العام و كذا لو وهب ما في بطن هذه الجارية او ما في بطن هذه الشاة او ما في ضرعها و ان سلطه على القبض عند الولادة او الحلب عالمگيري وان يكون مقسوما لوكان مما يحتمل القسمة

٦ و ان يكون الموهوب متميزا من غير الموهوب ولا يكون مشغولا بغير الموهوب حتى لو وهب ارضا فيها ذرع للموهب دون الزرع او عكسه لا يجوز او نخلا فيها ثمرة للواهب معلقة به دون الثمرة او عكسه لا يجوز و كذا لو وهب دارا او ظرفا فيها متاع للواهب * كذا في النهاية

٧ و لو و هب ما يقسم لرجلين و اقبضهما لا يجوز * كذا في محيط سرخسي

٨ رجل قال لرجل قد متعتك بهذا لثوب او بهذه الدراهم فهي هبة لانه يراد بلفظ الهبة تمليك الرقبة هبة ما هو متصل او مشغول بغير الموهوب اصله ان الهبة متى كانت متصلة بملكه اتصال خلقة و امكن فصله و تميزه عن غيره لا يجوز الهبة مالم يزل الانصال لان الهبة ما دامت متصلة بملكه او مشغولة بحقه لا يتحقق قبضها اذا القبض لا يتحقق * الا في المحوز و المميز * محيطسرخسى

٩ و لو وهب ارضا لابنه الصغير و فيها زرع للاب او وهب منه دارا و الاب فيها ساكن او فيها متاع او غير ساكن فيها بغير امر ذكر هشام عن ابي حنيفه رح انه لم يجز الهبة فيها و في المنتقي و البحر قال ابوحنيفه رح جاز و هو قول

۱۲ اذا اختلف الشفيع و المشتري في الثمن فالقول قول المشتري ولا يتحالفا و لو اقاما البينة فالبينة بينة الشفيع عند ابي حنيفة رح * عالم گيري

۱۳ و اذا باع دارا الا مقدار ذراع منها في طول الحد الذي يلي الشفيع لا شفعة له لانقطاع الجوار و هذه حيلة و كذا لو وهب منه هذا المقدار و سلمه اليه لما بينا و اذا ابتاع منها السهم بثمن ثم ابتاع بقيمتها فالشفعة للجار في السهم الاول دون الثاني و ان ابتاعها بثمن ثم دفع اليه ثوبا عوضا عنه فالشفعة بالثمن دون الثوب لانه عقد آخر و الثمن هو العوض عن الدار قال رض و هذه حيلة آخرى نعم الجوار و الشركة فيباع باضعاف قيمته و يعطى بها ثوب بقدر قيمه * هدايه

الباب الخامس في مسائل الهبة

۱ اما تفسيرها شرعا فهو تمليك عين بلا عوض * كذا في الكنز

۲ اما ركنها فقول الواهب وهبت لانه تمليك و انما يتم بالمالك وحده و القبول شرط الملك للموهوب له كذا في المحيط السرخسي

۳ و شرطه ان لايكون معلقا بما له خطر الوجود و العدم من دخول زيد و خروج خالد و نحو ذلك ولا مضافا الى وقت بان يكون و هبت هذا الشيء منك غدا * كذا في البدائع

۴ و شرطه ان يكون الموهوب مقبوضا حتى لا يثبت الملك للموهوب له بدون القبض * عالم گيري

۶ الشفعة واجبة للخليط في نفس المبيع ثم للخليط في حق المبيع
كالشرب و الطريق ثم للجار * هدايه

۷ اذا علم الشفيع بالبيع ينبغي ان يطلب الشفعة على الفور
و الشفيع يقول طلبت فالقول قول المشترى فلا بد من الاشهاد
للتوثيق و انما يصح طلب الشفعة بحضرة المشترى او البائع
او المبيع * المحيط السرخسي

۸ و الثالث طلب الخصومة و التملك و سنذكر كيفته من بعد
ان شاء الله تعالى قال و لا تسقط الشفعة بتاخير هذا الطلب
عند ابي حنيفة رح و هو رواية عن ابي يوسف * هدايه

۹ و ان لم يحضر الثمن الى مجلس القاضي فاذا قضى له بالشفعة له
احضار الثمن و هذا رواية الاصل و عن محمد رح ان القاضي
لا يقضي له بالشفعة حتى يحضر الثمن ثم اذا قضي له
قبل احضار الثمن فللمشترى حق حبس العقار حتى
يدفع الثمن اليه * عالم گيرى

۱۰ اشترى و صبغها بالوان كثيرة فالشفيع بالخيار ان شاء اخذ ها
و يعطي ما زاد على الصبغ او تركها كذا في القنية و اذا
انهدمت الدار بغير فعل احد فالشفيع بالخيار ان شاء اخذها
بجميع الثمن و ان شاء ترك و ان نقض المشتري البناء قيل
للشفيع ان شئت فخذ العرصة بحصتها و ان شئت فدع * هدايه

۱۱ لو اخذ الشفيع الارض بالشفعة فبنى فيها او غرس ثم استحق
و كلف المستحق الشفيع بالقلع فقلع البناء و الغرس رجع
الشفيع على المشتري بالثمن ولا يرجع بقيمة البناء و الغراس
كذا في التبيين *

الباب الرابع في مسائل الشفعة

١ اما تفسيرها شرعا فهو تمليك البقعة المشتراة بمثل الثمن الذي قام على المشترى * هكذا في المحيط السرخسي

٢ اما شرطها فانواع منها عقد المعاوضة فهو البيع او ما هو بمعناه فلا تجب الشفعة بما ليس ببيع و لا بمعنى البيع حتى لاتجب بالهبة و الصدقة و الميراث و الوصية و ان كان الهبة بشرط العوض فان تقابضا وجبت الشفعة و لو وهب عقارا من غير شرط العوض ثم ان الموهوب له عوضه من ذلك دارا فلا شفعة في الدارين * عالم كيري

٣ و منها ان يكون المبيع عقارا او هو بمعناه فان كان غير ذلك فلا شفعة فيه عند عامة العلماء سواء كان العقار مما يحتمل القسمة او لا يحتملها و منها زوال ملك البائع عن المبيع فاذا لم يزل فلا تجب الشفعة * عالم كيري

٤ و المسلم و الذمي في الشفعة سواء المعمومات و لانهما يستويان في السبب و الحكمة فيستويان في الاستحقاق و لهذا يستوي فيه الذكر و الانثى و الصغير و الكبير و الباغي و العادل و الحر و العبد اذا كان ماذونا او مكاتبا * هدايه

٥ فكل ما يثبت للمشترى من غير شرط نحو الرد بخيار الرؤية يثبت للشفيع و ما لا يثبت للمشترى الا بالشرط لا يثبت للشفيع الا بالشرط * هكذا في خزانة المفتيين

بخلاف خيار الشرط لان الخيار هناك للاختبار و انه بالاستعمال فلا يكون الركوب مسقطا * هدايه

۳۳ من اشتري عبدين او ثوبين او نحو هما صفقة واحدة و قبض احدهما و وجد بالاخر الذي لم يقبض عيبا فان له الخيار ان شاء اخذهما بجميع الثمن و ان شاء رد هما و ليس له ان ياخذ السليم و يرد المعيب بحصة الثمن في هذا فان كان العيب في المقبوض اختلفوا فيه يروي عن ابي يوسف رح انه يرده خاصة و الصحيح انه ياخذ هما او يرد هما و لو قال المشتري انا امسك المعيب و اخذ النقصان ليس له ذلک فاما لوكان قبضهما اعني العبدين ثم وجد باحدهما عيبا فان له ان يرده خاصة كذا في فتح القدير و ليس له ان يرد هما الا برضاء البائع كذا في المحيط ثم هذا فيما يمكن افراز احد هما دون الاخر في الانتفاع كالعبدين و اما اذا لم يمكن في العادة كالنعلين او الخفين او مصراعي باب فوجد باحدهما عيبا فانه يرد هما او يمسكهما بالاجماع * فتح القدير

۳۴ و نهي رسول الله صلي الله عليه و سلم عن النجش و عن السوم و عن تلقي الجلب و عن بيع الحاضر للبادي و البيع عند اذان الجمعة * في الهدايه

او على خلافها * فتح القدير

٢٧ و كما يثبت الخيار في المبيع للمشتري يثبت للبائع في الثمن اذا كان عينا * فتح القدير

٢٨ اذا اشتريك و لم يعلم وقت الشراء و لا قبله و العيب يسير او فاحش فله الخيار ان شاء رضي بجميع الثمن و ان شاء رده * طحاوي و اذا حدث عند المشتري عيب بافة سماوية او غيرها ثم اطلع على عيب كان عند البائع فله ان يرجع بنقصان العيب و ليس له ان يرد المبيع الا ان يرضي البائع ان ياخذه بعيبه الحادث عند المشتري * فتح القدير

٢٩ فاذا ازاله عن ملكه بالبيع او ما اشبهه لا يرجع بنقصان العيب و في كل موضع لا يمكنه الرد لوكان المبيع قائما على ملكه فاذا ازاله عن ملكه بالبيع او ما اشبهه يرجع بنقصان ن العيب * في المحيط

٣٠ و من اشتري بيضا او بطيخا او قثاء او خيارا او جوزا فكسره فوجده فاسدا فان لم ينتفع به رجع بالثمن كله و ان كان ينتفع به مع فساده لم يرده لان الكسر عيب حادث و لكنه يرجع بنقصان العيب دفعا للضرر بقدر الامكان * في الهدايه

٣١ و من باع عبدا فباعه المشتري ثم رد عليه بعيب فان قبل بقضاء القاضي باقراره او ببينة او باباء يمين له ان يرده على بايعه * في الهدايه

٣٢ و من اشتري جارية فوجد بها قرحا فداواها او كانت دابة فركبها في حاجته فهو رضا لان ذلك دليل قصده الاستبقا

و الدياس و قدوم الحاج و شرط خيار غير موقت اصلا و شرط خيار موقت بالزائد على ثلثة ايام في البدائع و اما الخاصة فمنها معلومة الاجل في البيع بثمن موجل فيفسد انكان مجهولا * عالم گيري

١٩ و من كان له على آخر عشرة دراهم فباعه الذي عليه العشرة دينارا بعشرة دراهم و دفع الدينار و تقاصا العشرة بالعشرة فهو جائز * في الهداية

٢٠ المبيع اذا كان منقولا لا يجوز بيعه قبل القبض * في المحيط

٢١ مطلق العقد يقتضي وصف السلامة فعند فواته يتخير كيلا يتضرر بلزوم مالا يرضى به * في الهداية

٢٢ اذا اطلع المشتري على عيب في المبيع فهو بالخيار ان شاء اخذه بجميع الثمن و ان شاء رده * في الهداية

٢٣ اذا باع ارضا او كرما و لم يذكر الحقوق ولا المرافق ولا كل قليل و كثير فانه يدخل تحت البيع ماركب فيه للتابيد نحوالغراس و الاشجار و الثمر و الزرع لا يدخلان في البيع استحسانا ان لا يشترط * عالم گيري

٢٤ و اذا كان الخيار مشروطا للمشتري فالثمن لا يزول عن ملكه بالاتفاق و خيار البائع يمنع خروج المبيع عن ملكه فلو قبضه المشتري وهلك في يده في مدة الخيار ضمنه بالقيمة * عالم گيري

٢٥ الاصل ان المشتري اذا تصرف في المشترى بعد العلم بالعيب تصرف الملاك بطل حقه في الرد * عالمگيري

٢٦ من اشتري شيئاً لم يره فله الخيار اذا رأه ان شاء اخذه بجميع ثمنه و ان شاء رده سواء رأه على الصفة التي و صفت بها

۱۱ اما شرائط الانعقاد فانواع منها في العاقد و هو ان يكون عاقلا مميزا في الكفاية فيصح بيع الصبي و المعتوه اللذين يعقلان البيع و اثره * فتح القدير

۱۲ و ليس شرط الاجل في المبيع العين و الثمن العين و يجوز في المبيع الدين و الثمن الدين * في البدائع

۱۳ منها ان يكون المبيع معلوما و الثمن معلوما علما بمنع المنازعة * بحر الرائق.

۱۴ منها في المبيع و هو ان يكون موجودا فلا ينعقد بيع المعدوم و ما له خطر العدم بحر الرائق و ان يكون مالا متقوما شرعا مقدور التسليم في الحال او في ثاني الحال * فتح القدير

۱۵ منها المماثلة بين البدلين في اموال الربوا * بحر الرائق

۱۶ و منها ان يكون المشروط محظورا و شرط لا يقتضيه العقد و فيه منفعة للبائع او المشتري او للمبيع ان كان من بني أدم و ليس بملائم للعقد و لو شرط الخيار اكثر من ثلثة ايام او لم يبين وقتا او ذكر وقتا مجهولا فاجاز في الثلث او سقط بموته او بموت العبد او اعتقه المشتري او احدث فيه ما يوجب لزوم العقد انقلب جائزا * عالم گيري

۱۷ يصح العقد بشرط الخيار لاحد العاقدين او لهما جميعا فعند ابي حنيفه رح لا يجوز اكثر من ثلثة ايام و عندهما يجوز اذا سمى مدة معلومة مختار الفتاوى و الصحيح قول الامام كذا في جواهر الا خلاطي *

۱۸ الخلوص عن شرط خيار موقت بوقت مجهول جهالة متفاحشة كهبوب الريح و مجي المطر و قدوم فلان او متقاربة كالحصاد

الباب الثالث في مسائل البيع

١ تعريف البيع فهو مبادلة المال بالمال بالتراضي * عالمكيري

٢ اما ركنه فنوعان احدهما الايجاب و القبول و الثاني التعاطي * محيط سرخسي

٣ و بالنظر الى المبيع اربعة بيع العين بالعين و هي المقائضة و بيع الدين بالدين و هو الصرف و بيع الدين بالعين و هو السلم و عكسه و هو و بيع العين بالدين كاكثر البياعات * بحر الرائق

٤ اما انواعه فبالنظر الي مطلق البيع اربعة نافذ و موقوف و فاسد و باطل * بحر الرائق.

٥ فالنافذ ما افاد الحكم في الحال * بحر الرائق.

٦ و الموقوف ما افاده عند الاجازة * بحر الرائق.

٧ و الفاسد ما افاده عند القبض * بحر الرائق.

٨ و الباطل ما لم يفده اصلا * بحر الرائق.

٩ و باعتبار تسمية البدل يتنوع الى اربعة مساومة و هو بيع بالثمن الذى يتفقان عليه و مرابحة و هو بيع بمثل الثمن الاول و زيادة و تولية و هو بيع بالثمن الاول لا غيره و وضيعة و هو بيع بانقص من الثمن الاول * محيط سرخسي

١٠ أن يكون العاقد متعددا فلا يصلح الواحد عاقدا من الجانبين في البدائع الا الاب و وصييه و القاضي اذا باعوا اموا لهم من الصغير او اشتروا منه و الا الرسول من الجانبين .بحر الرائق و الا العبد يشترى نفسه من مولاه بامره * عيني

زادت بواحد لان للبنت النصف ستة من اثنى عشر للزوج
الربع ثلثة منها و لكل من الابوين اثنان منها فيكون المجموع
ثلثة عشر و النقض في هذه الامثلة و نظائرها انما يدخل على
من عددناه للاخت فللاختين في المثال الاول النصف الباقي
و للاخت من الاب في الثاني الثلث اعني الاثنين الباقيين
من الستة و للبنتين في الثالث الخمسة الباقية من الاثني عشر
و كذلك للبنت في الرابع *

٣٢ و لا يرد الفاضل على زوج ولا على زوجة مع وجود ذي نسبة
و لا على الام مع الاخوة الحاجبة لها و ان لم يرثوا و لا على
المتقرب بالام خاصة مع وجود المتقرب بالابوين *

٣٣ يحتبي الولد الاكبر من تركة ابيه بثياب بدنه و خاتمه و سيفه
و مصحفه و عليه قضاء ما عليه من صلوة و صيام و من شرط
اختصاصه ان لا يكون سفيهاً و لا فاسد الرأى على قول مشهور *

هذه الاحكام مستخرجة من الشرايع

كذلك على اختلاف مراتبه بطل هذا العقد و لا يكون موجبا للارث *

٢٩ و اما الحجب عن بعض الفرض فاثنان حجب الولد و حجب الاخوة اما الولد فانه و ان نزل ذكرا كان او انثى يمنع الابوين عمازادا عن السدسين الا مع البنت او البنتين فصاعدا مع احد الابوين *

٣٠ موانع الارث ثلثة الكفر و القتل و الرق و امـا القتل فيمنع القاتل من الارث اذا كان عمدا ظلما و لو كان بحق لم يمنع و لو كان القتل خطاء ورث على الاشهر *

٣١ و في الصورة الثانية و هي ان يكون المال ناقصا عن سهامهم و ذلك حيث يزاحمهم الزوج او الزوجة و قد اتفق اصحابنا ان النقص حينئذ انما يقع على البنت و البنات او الاخت و الاخوات من الابوين او من الاب و لا يقع نقص علي غير هولاء الاربع من اصحاب الفروض فلو خلف زوجا و اختين لاب و ام او لاب فله النصف و لهما الثلثان فتصح الفريضة من ستة و قد زاد فروضهم عنها بواحد و كذا لوكان مع الزوج اخت لاب و اخت لام فله النصف و للاخت من الاب النصف و للاخت من الام السدس و لو كان مع الزوج بنتان و ابوان فللزوج الربع ثلثة من اثني عشر و للبنتين الثلثان ثمانية منها و لكل واحد من الابوين السدس اثنان منها فزادت فروضهم بثلثة و لو كان مع الزوج بنت و ابوان

٢٢ اذا عقد المريض على امرأة في مرض مخوف او غير مخوف فمات في ذلك المرض من غير ان يبرأ من مرضه بين عقده و موته قبل ان يدخل بها بطل العقد الواقع بينهما بمعني عدم لزومه الا بعد دخوله بها او برئه من مرضه هذا فلا يتحقق بينهما توارث ولو عقدت المريضة على نفسها من رجل صحيح ثم مات الزوج قبل الدخول فالاقرب صحة العقد و ثبوت الارث *

٢٣ من طلق امرأته في مرضه فمات فيه ورثته الى ان تمضي سنة من حين الطلاق فان مات بعد السنة لم ترثه *

٢٤ قال اذا طلق الرجل امرأته توارثا ما كانت في العدة فاذا طلقها الطلقة الثالثة فليس له عليها رجعة ولا ميراث بينهما *

٢٥ لا توارث بين المتمتعين مطلقا على المشهور بين الاكثر لعدم اطلاق الزوجة على المتمتعة حقيقة نظرا الى جواز الجمع بين الزيادة على الاربع منهن *

٢٦ اما الموجب الثالث من موجبات الارث فهو الولاء و لا يتحقق الارث بالولاء مطلقا الا بعد فقد النسب فمع وجود رحم قريب و ان بعد قرابة لا يرث صاحب الولاء مطلقا بالاجماع *

٢٧ و للولاء طبقات و اول طبقاته ولاء العتق و يختص الارث فيه بالمعتق من طبقات الولاء ضامن الجريرة و هو الذي يضمن عمن ليس له وارث نسبي و لا ولاء عتيق جريرة و جنايته الخطائية و كون هذا من موجبات الارث *

٢٨ فلو كان وارث نسبي و ان بعد او معتق او قريب لمعتقه

۱۹ كل من له الى الميت قرابتان مختلفتان بحيث لا يمنع احدىها الاخرى لا يحجب من له اليه قرابة واحدة مع التساوي في الرتبة بل ياخذ ذوالقرابتين من جهتي استحقاقه النصيبين و ياخذ ذوالقرابة الواحدة من جهة استحقاقه نصيبه الواحد من غير خلاف لان مدار الحجب انما هوا لاختلاف في القرب و البعد بحسب البطون لا على وحدة القرابة و تعددها فلوخلف خالا و عما هو خال له ايضا فللخال الثلث وللعم الثلثان و ياخذ العم ايضا من الخال نصف نصيبه فللخال واحد وللعم خمسة *

۲۰ اما الموجب الثاني للارث الزواج فللزوج و الزوجة نصيب من الارث مفروض و لا يحجبهما احد من الورثة عن ارثهما بل يدخلان على جميع طبقات النسب و طبقات الولاء بالاجماع لعموم قوله سبحانه ولكم نصف ماترك ازواجكم ان لم يكن لهن ولد فان كان لكم ولد فلكم الربع مماتركن من بعد وصية يوصين بها او دين ولهن الربع مما تركتم ان لم يكن لكم ولد فان كان لكم ولد فلهن الثمن مماتركتم من بعد وصية توصون بها او دين *

۲۱ و ان ماتت الزوجة و لم تخلف وارثا نسبيا و لا ولائيا و انحصر وارثها في الزوج و الامام فللزوج نصفه المفروض و يرد عليه النصف الآخر الفاضل عن فرضه على المشهور *

۲۲ و لو مات الزوج و لم يترك وارثا نسبيا و لا و لائيا سوى الزوجة فلها الربع المفروض و الثلثة الارباع الباقيه للامام ولا رد عليها مطلقا على المشهور *

و ان كان اتحاد الصنف فى هذه الطبقة و انتسابهم الى الميت بالاخوة الحاصلة لابيه و امه يقتضي جريانها فيهم ايضا بالنسبة الى الآخرين كما تجري في من يتقربون اليه بالاخوة الحاصلة له فان الاخ منهما مثلا يحجب الاخت منه خاصة و بالعكس الا ان انتساب الاعمام و العمات و الاخوال و الخالات اليه لما كان بالاب و الام الذين هما الاصل فيهم صار كل واحد منهم في مرتبة مغائرة لمرتبة الآخر كمرتبتى الاصلين فلا يحجب العم او العمة من الابوين الخال او الخالة من الاب وحده و انما يحجب العم او العمة منه خاصة وكذا لا يحجب الخال او الخالة منهما العم او العمة منه خاصة بل يحجب الخال او الخالة منه بالاتفاق *

١٦ فلو خلف عما لاب و خالة لاب و ام فللعم الثلثان و للخالة الثلث و كذا لو خلف اخا لاب و عمة لاب وام و في رواية ايوب عن ابي عبد الله عليه السلام قال ان في كتاب علي عليه السلام ان العمة بمنزلة الاب و الخالة بمنزلة الام *

١٧ كل من له قرابة الى الميت من جهتي الاب و الام جميعا فهو الحاجب لمن له تلك القرابة من جهة الام خاصة من الرددون الفرض بشرط تساويهما في الدرجة اذ لا يحجب العم من الابوين الاخت من الام لا من الرد و لا من الارث مطلقا لبعده عن درجتها *

١٨ فاذا اجتمع الاخت من الابوين مع الاخت من الام فللاخت منهما النصف بالفرض و الاخرى السدس كذلك ان كانت واحدة و الثلث ان كانت اكثر *

و اولادهم و ان نزلوا يرث اعمام الاب و اعمام الام و عماتهما و اخوالهما و خالاتهما ثم اولادهم مع فقدهم و هكذا و ان نزلوا بشرط رعاية الاقرب و الترتيب فيهم و هم المرتبة الثانية من درجات تلك الطبقة و اذا لم يوجد احد من هذه المرتبة فاعمام الجد و الجدة و عماتهما و اخوالهما و خالاتهما يرثون و مع فقدهم فاولادهم و ان نزلوا الاقرب فالاقرب و هم المرتبة الثالثة من هذه الطبقة و مع فقدهم جميعا يرث اعمام اب الجدو امه و اب أجدة و امها و اخوالهما و خالاتهما ثم اولادهم مع فقدهم و هم المرتبة الرابعة *

١٣ كل من له قرابة الى الميت من جهتي الاب و الام في درجة فهو الحاجب لمن له تلك القرابة بعينها الى الميت من جهة الاب وحده ذكرا كان او انثى فيمنعه من الارث مطلقا فالاخ او الاخت المتقرب الى الميت من جهتهما معا يحجب الاخ او الاخت المتقرب الى الميت من جهة الاب وحده في تلك الدرجة و كذا الاعمام و العمات و الاخوال و الخالات بشرط اتحاد الدرجة فابن الاخ من الاب و الام لا يحجب الاخ من الاب انما يحجب ابن الاخ منه الذى في درجته و العم من الابوين بمعني كونه اخا لاب الميت منهما لا يحجب الاخ من الاب ولا ابن الاخ منه و انما يحجب العم من الاب وحده *

١٤ و ابن العم منهما لا يحجب العم او الخال منه الا في المسئلة الاجماعية انما يحجب ابن العم للاب الذي في درجته و هكذا في سائر الدرجات *

١٥ ولا تجري في الاعمام و العمات بالنسبة الى الاخوال و الخالات

لا يحجب الدرجة الابعد من الصنف الآخر بل يحجبها ان كانت من صنف واحد كما لا يحجب الدرجة الابعد من الاولاد بوجود الوالدين اواحدهما فالجد الاسفل يشارك اولاد الاخ اوالاخت و اولاد اولادهما و ان نزلوا *

١٠ الطبقة الثالثة اخوة الاب و اخوة الام و اخواتهما المعبر عنهم بالاعمام والعمات و الاخوال و الخالات ثم اولادهم مع فقدهم ثم اولاد اولادهم و هكذا والاقرب منهم يمنع الابعد فابن العم لايرث مع العم اوالعمة و كذا ابن الخال مع الخال اوالخالة *

١١ و هذه الطبقة صنف واحد نظرا الى ان ارثهم انما يكون بحسب كونهم اخوة او اخوات لاب الميت اوامه و الاخوة و الاخوات صنف واحد فكذا من يتقرب الى الميت بالنظر اليهم و لهذا الصنف الغير المحصور درجات و مراتب حسب القرب والبعد كدرجات الاخوة و مراتبهم فالعم او العمة اقرب من ابن الخال و من ابن العم و الخال او الخالة اقرب من ابن العم اوالعمة ومن ابن الخال او الخالة فلايرث مع الخال المنفرد او الخالة المنفردة احد من اولادهما ولا من اولاد الاعمام و العمات والعم المنفرد اوالعمة المنفردة لايرث معه احد من اولادهما ولا من اولاد الخال او الخالة و هكذا تعتبر الاقربية و الابعدية فيهم و في اولادهم و اولاد اولادهم الا في صورة واحدة اجماعية عندنا و هي ان ابن العم من الاب و الام معا يحجب العم من الاب وحده ويمنعه من الميراث و ياخذ ابن العم منهما المال كله مع حصار الوارث فيه و في عمه من الاب *

١٢ ثم مع فقد درجات الاعمام و العمات و الاخوال و الخالات

فرع غير محصور بحسب الدرجات و هم الاولاد و ان نزلوا بشرط رعاية الترتيب الاقرب فالاقرب فيقوم غير هم مقامهم من اولادهم مع فقد هم و الاقرب من كل واحد من هذين الصنفين كالاب مثلا لا يمنع الابعد من الصنف الآخر كولد ولد الولد بل يمنعه من كان من صنفه كمنع الولد و ولد الولد *

٦ لا يرث احد من خلق الله مع الولد الا الابوان و الزوج و الزوجة *

٧ و ان لم يكن ولد كان ولدالولد ذكورا و اناثا فانهم بمنزلة الولد و ولد البنين بمنزلة البنين و يرثون ميراث البنين و ولد البنات بمنزلة البنات يرثون ميراث البنات *

٨ الطبقة الثانية الاجداد و الجدات و ان علوا و الاخوة و الاخوات و اولاد هم و ان نزلوا و الاقرب منهم يمنع الابعد فاب الجد لا يرث مع الجد و كذا مع الجدة و هكذا و ابن الاخ لا يرث مع الاخ ولا مع الاخت و ابن ابن الاخ لا يرث مع ابن الاخ و لا مع ابن الاخت *

٩ ففي هذه الطبقة ايضا صنفان احدهما الاجداد و الجدات و ان علوا بشرط الترتيب و رعاية الاقرب فالاقرب و ثانيهما الاخوة و الاخوات و اولادهم و ان نزلوا بشرط رعاية الاقرب فالاقرب و لكل من هذين الصنفين درجات غير محصورة عروجا و نزولا فدرجة الاجداد و الجدات اقرب من درجة آبائهم و هكذا درجة الاخوة و الاخوات اقرب من درجة اولادهم و الدرجة الاقرب من كل صنف من هذين الصنفين

الباب الثاني في الارث على مذهب الامامية

١ الاسباب الموجبة لاستحقاق الارث ثلثة بالضرورة من الدين *

٢ احدها النسب و هو اتصال احد الشخصين بالاخر بنسب من الانساب المتحققة من الولادة و ثانيها السبب و هو اتصال احد هما بالآخر بسبب من الزواج الحاصل بينهما بالعقد و ثالثها الولاء و هو اتصال احدهما بالآخر بعتق او نحوه من الاسباب الشرعية التي لا تكون بالولادة و لا بالزواج *

٣ اما الموجب الاول فله طبقات بمعنى تقدم ارث كل طبقة سابقة على لاحقتها فلو وجد من الطبقة الاولى احد و لو كان انثى لم يثبت الارث للطبقة الثانية و هكذا الطبقة الثانية بالنسبة الى الثالثة *

٤ الطبقة الاولى الاب و الام من غير تعد منهما اي الاعلى من الاجداد و الجدات و الاولاد مع التعدى الى الاسفل من اولادالاو لاد و ان نزلوا لان الاقرب منهم الي الميت يمنع الابعد فالاب و الام او احد هما يرث مع الولد و مع ولد الولد و مع ولد ولد الولد و هكذا و ولد الولد لا يرث مع الولد و ولد ولد الولد لا يرث مع ولد الولد *

٥ ففي هذه الطبقة صنفان صنف اصل محصور و هما الوالدان لا يقوم غير هما مقامهما من آبائهما و امهاتهما و صنف آخر

بالاول و الذي يليه بالثاني و الثالث على هذا ثم يخرج
القرعة فمن خرج اسمه اولا فله السهم الاول و من خرج
ثانيا فله السهم الثاني * هدايه

١١٥ المهاياة جائزة استحسانا للحاجة اليه اذ يتعذر الاجتماع على
الانتفاع فاشبه القسمة و لهذا يجري فيه جبر القاضي كما
تجبر في القسمة الا ان القسمة اقوى منه في استكمال
المنفعة لانه جمع المنافع في زمان واحد و التهائي جمع على
التعاقب و لهذا لو طلب احد الشريكين القسمة و الاخر
المهاياة يقسم القاضي * هدايه

من تصحيح المسئلة و يجعل مجموع الديون بمنزلة مجموع التصحيح و يعمل ههنا ما مر في تعيين نصيب كل وارث * شريفيه

الفصل الثالث عشر

۱۱۲ و ان حضر وارث واحد لم يقسم و ان اقام البينة لانه لابد من حضور خصمين لان الواحد لا يصلح مخاصما و مخاصما و كذا مقاسما و مقاسما بخلاف ما اذا كان الحاضر اثنين على ما بينا و اذا كان كل واحد من الشركاء ينتفع بنصيبه قسم بطلب احدهم * هدايه

۱۱۳ و ان كان كل واحد يستضر لصغره لم يقسمها الا بتراضيهما لان الجبر على القسمة لتكميل المنفعة و في هذا تفويتها و يجوز بتراضيهما لان الحق لهما و هما اعرف بشانهما اما القاضي فيعتمد الظاهر و تقسم العروض اذا كانت من صنف واحد لان عند اتحاد الجنس يتحد المقصود فيحصل التعديل في القسمة و التكميل في المنفعة و لا يقسم الجنسين بعضها في بعض لانه لا اختلاط بين الجنسين فلا تقع القسمة تمييزا بل تقع معاوضة و سبيلها التراضي دون جبر القاضي * هدايه

۱۱۴ و ينبغي للقاسم ان يصور ما يقسمه ليمكنه حفظه و يعدله يعني يسويه على سهام القسمة و يروى يعزله اي يقطعه بالقسمة عن غيره و يذرعه ليعرف قدره و يقوم البناء لحاجته اليه في الاخرة و يفرز كل نصيب عن الباقي بطريقه و شربه حتى لا يكون لنصيب بعضهم بنصيب البعض تعلق فتنقطع المنازعة و يتحقق معنى القسمة على التمام ثم يلقب نصيبا

الفصل الثاني عشر

١٠٧ ثم انه لما فرغ من تصحيح المسائل وتعيين النصيب منه لكل فريق من الورثة و لكل واحد من الفريق شرع تبئين قسمة التركات بين الورثة و الغرماء و تعيين الانصباء من التركة * شربفيه

١٠٨ و ان كانت بينهما مباينة فاضرب ما كان لكل فريق في كل التركة ثم اقسم الحاصل على جميع تصحيح المسئلة فالخارج نصيب ذلك الفريق شريفيه

١٠٩ اما لمعرفة نصيب كل فريق منهم فاضرب ما كان لكل فريق من اصل المسئلة في وفق التركة ثم اقسم المبلغ الحاصل من هذا الضرب على وفق تصحيح المسئلة ان كانت بين التركة و تصحيح المسئلة موافقة * شربفيه

١١٠ و اذا كانت بين التركة و التصحيح موافقة فاضرب سهام كل وارث من التصحيح في وفق التركة ثم اقسم المبلغ الحاصل من الضرب على وفق التصحيح فالخارج نصيب ذلك الوارث * شريفيه

١١١ و اما في معرفة قضاء الديون فدين كل غريم بمنزلة سهام كل وارث في العمل و مجموع الديون بمنزلة التصحيح اعلم ان الباقي من التركة بعد التجهيز و التكفين ان و في بالديون فلا اشكال لان كل غريم ياخذ دينه كملا و ان لم يف بها مع تعدد الغرماء فالطريق في معرفة نصيب كل غريم من تلك التركة القاصرة ان يجعل دين كل واحد منهم بمنزلة سهام كل وارث

اقل النصيبين و يوقف الباقي و ان كان معه وارث يحجب
به لا يعطى اصلا بيانه رجل مات عن ابنتين و ابن مفقود و
ابن ابن و بنت ابن و المال في يد الاجنبي و تصادقوا على
فقد الابن و طلبت الابنتان الميراث تعطيان النصف لانه
متيقن به و يوقف النصف الاخر و لا يعطى ولد الابن لانهم
يحجبون بالمفقود لو كان حيا فلا يستحقون الميراث
بالشک * هدايه

١٠٣ و نظير هذا الحمل فانه توقف له ميراث ابن واحد على
ما عليه الفتوى هدايه

١٠٤ و لوكان معه وارث آخر ان كان لا يسقط بحال و لا يتغير
بالحمل يعطى كل نصيبه و ان كان ممن يسقط بالحمل
لا يعطى * هدايه

١٠٥ و ان كان ممن يتغير به يعطى الاقل للتيقّن به كما
في المفقود هدايه

الفصل الحادى عشر

١٠٦ و اذا غرق اخوان اكبر و اصغر و خلف كل منهما اما و بنتا و
و مولى و ترک كل منهما تسعين دينارا فعندنا تقسم تركة
كل واحد منهما فيعطى لام كل واحد منهما سدس تركة و هو
خمسة عشر و لبنت كل منهما النصف و هو خمسة و اربعون
و لمولاه مابقى و هو ثلثون و عند علي و ابن مسعود رض
في احدى الروايتين عنهما يحكم بموت الاكبر اولا
فتقسم تركته شريفيه

۹۹ فانظران كانت بينهما موافقة فاضرب وفق التصحيح الثاني في جميع التصحيح الاول على قياس ما مر في باب التصحيح من انه اذا انكسرت سهام طائفة واحدة عليهم و كانت بين سهامهم و روسهم موافقة يضرب وفق عدد الرؤس في اصل المسئلة فكذا ههنا يضرب وفق التصحيح الثاني الذي هو بمنزلة الرؤس هناك في التصحيح الاول القائم ههنا مقام اصل المسئلة فيحصل به ما تصح منه المسئلتان شريفيه

۱۰۰ كزوج و بنت وام فمات الزوج قبل القسمة عن امرأة و ابوين ثم ماتت البنت عن ابنين و بنت وجدة ثم ماتت الجدة عن زوج و اخوين فسهام ورثة الميت الاول يضرب في المضروب اعني في التصحيح الثاني اوفي وفقه وسهام ورثة الميت الثاني يضرب في كل مافي يده او في وفقه وان مات ثالث او رابع او خامس فاجعل المبلغ الثانى مقام الاول و الثالث مقام الثانى في العمل ثم في الرابع و الخامس كذلك الى غيرالنهاية * شريفيه

الفصل العاشر

۱۰۱ المفقود حي في ماله حتى لا يرث منه احد و توقف ماله حتى تصح موته او يمضي عليه المدة و اختلفت الروايات في تلك المدة و قال بعضهم تسعون سنة و عليه الفتوى * سراجيه

۱۰۲ كذلك لو اوصى للمفقود و مات الموصى ثم الاصل انه لوكان مع المفقود وارث لا يحجب به و لكن ينقص حقه به يعطى

فضربنا ثلث التسعة في اثني عشر فحصلت ستة و ثلثون
فضربنا هذا الحاصل في الاربعين فبلغ الفا و اربع ماية و اربعين
فمنها تصح المسئلة على آحاد الفرق كان نصيب الزوجات
من الاربعين خمسة و قد ضربناها في المضروب الذي هو ستة
و ثلثون فبلغ ماية و ثمانين فلكل واحدة من الزوجات خمسة
و اربعون و كان نصيب البنات منها ثمانية و عشرين و قد
ضربناها في ذلك المضروب فصار الفا و ثمانية فلكل واحدة
منهن ماية و اثني عشر و كان نصيب الجدات منها سبعة
و قد ضربناها في المضروب المذكور فصار مايتين واثنين و خمسين
فلكل واحدة من الجدات اثنان و اربعون * شريفيه

الفصل التاسع

٩٦ الاصل فيه ان فيما ذكر من صيرورة بعض الانصباء ميراثا قبل
القسمة ان تصحيح مسئلة الميت الاول بالقواعد السابقة و تعطي
سهام كل وارث من هذا التصحيح شريفيه

٩٧ ثم تصحيح مسئلة الميت الثاني بتلك القواعد ايضا و تنظر
بين ما في يده من التصحيح الاول و بين التصحيح الثاني ثلثة
احوال هي المماثلة و الموافقة و المباينة * شريفيه

٩٨ و ان كانت بينهما اي بين ما في يده من التصحيح الاول و بين
التصحيح الثاني مباينة فاضرب كل التصحيح الثاني في كل
التصحيح الاول على قياس ما ذكر في باب التصحيح على تقدير
المباينة بين رؤس الطائفة و بين سهامهم * شريفيه

فيما بقي من مخرج فرض من لا يرد عليه فيكون الحاصل
نصيب ذلك الفريق ممن يرد عليه و ذلك لان حق كل
فريق ممن يرد عليه انما هو في الباقي من مخرج فرض من
لا يرد عليه بقدر سهامهم ففى المسئلة المذكورة للزوجات
ذلك المخرج واحد فاذا ضربناه في الخمسة التي هي مسئلة
من يرد عليه كان الحاصل خمسة فهي حق الزوجات من
الاربعين و للبنات من مسئلة من يرد عليه اربعة فاذا ضربنا ها
فيما بقي من مخرج فرض من لا يرد عليه و هو سبعة بلغ
ثمانية و عشرين فهي لهن من الاربعين و للجدات من مسئلة
من يرد عليه واحد فاذا ضربناه في السبعة كان سبعة فهي
للجدات فقد استقام بهذا العمل فرض من لا يرد عليه و فرض كل
فريق ممن يرد عليه و ان لم يستقم على آحاد كل فريق فلذلك
قال فان انكسرت السهام الماخوذة من مخرج فروض الفريقين على
البعض او الجميع صححت المسئلة بالاصول السبعة المذكورة في
باب التصحيح ففي الصورة التي نحن فيها كان من الاربعين
نصيب الزوجات الاربع خمسة فبين رؤسهن و سهامهن مباينة
فاخذنا مجموع عدد رؤسهن و كانت سهام البنات التسع
منها ثمانية و عشرين فبين الرؤس والسهام مباينة فتركنا عدد
الرؤس بحاله وكانت سهام الجدات الست منها سبعة وبينهما
ايضا مباينة فاخذنا عدد رؤسهن باسره ثم طلبنا بين اعداد
الرؤس و الرؤس الموافقة فوجدنا ان رؤس الجدات و رؤس
الزوجات متوافقة بالنصف فضربنا نصف الاربعة في الستة
فبلغ اثني عشر هي موافقة لرؤس البنات التسع بالثلث

بلغ اربعة و عشرين فلكل واحدة منهن اربعة و ان لم يستقم مابقى من مخرج فرض من لا يرد عليه على مسئلة من يرد عليه فاضرب جميع مسئلة من يرد عليه في مخرج فرض من لا يرد عليه فالمبلغ الحاصل بهذا الضرب مخرج فروض الفريقين اى فريقى من يرد عليه و من لا يرد عليه و ان لم يكن تصحيح المسئلة بالنسبة الى أحادهما كاربع زوجات و تسع بنات و ست جدات اصل هذه المسئلة على ما سبق من اربعة و عشرين لاختلاط الثمن بالثلثين و السدس لكنها ردية فرددنا ها الى اقل مخارج فرض من لا يرد غليه و هو الثمانية فاذا دفعنا ثمنها الى الزوجات بقيت سبعة فلا تستقيم على الخمسة التى هي مسئلة من يرد عليه ههنا لان الفرضين ثلثان و سدس بل بينهما مباينة فيضرب جميع مسئلة من يرد عليه اعني الخمسة في مخرج فرض من لا يرد عليه و هو الثمانية فبلغ اربعين فهذا المبلغ مخرج فروض الفريقين و اذا اردت ان تعرف حصة كل فريق منهما من هذا المبلغ الذي هو مخرج فروضهما فطريقه ما اشار اليه بقوله ثم اضرب سهام من لا يرد عليه من اقل مخارج فرضه في مسئلة من يرد عليه فيكون الحاصل نصيب من لا يرد عليه من المبلغ المذكور و ذلك لانا ضربنا مسئلة من يرد عليه في اقل مخارج فرض من لا يرد عليه فيكون الحاصل من ضرب سهامه من هذا الاقل في المضروب الذي هو تلك المسئلة حصة من المبلغ الذى حصل من ضرب هذا المضروب في المخرج الاقل على قياس ما حققته فيما مر و اضرب ايضا سهام كل فريق ممن يرد عليه من مسئلتهم

لان مسئلة من يرد عليه لايجاوز الخمسة كما مر و لا يمكن
ان يستقيم السبعة علي عدد اقل منها فليس بمكن ان يستقيم
الباقي من مخرج فرض من لا يرد عليه على مسئلة من يرد
عليه في هذا القسم الا في صورةٍ واحدة و هي ان يكون للمزوجات
اي لهذا الجنس واحدا كان او اكثر الربع و يكون الباقي بين
اهل الرد اثلا ثا كزوجة و اربع جدات و ست اخوات لام
فان اقل مخرج فرض لا يرد عليه اربعة فاذا اخذت امراة
واحدا منها بقيت ثلثة و هي ههنا مستقيمة على مسئلة من
يرد عليه لانها ايضا ثلثة لان حق الاخوات لام الثلث و حق
الجدات* السدس فللاخوات سهمان و للجدات سهم واحد
ففي هذه الصورة استقام الباقي على مسئلة من يرد عليه لكن
نصيب الجدات الاربع واحد فلا يستقيم عليهن بل بينهما
مباينة فحفظنا عدد رؤسهن باسرها و كذا نصيب الاخوات
الست اثنان فلا يستقيمان عليهن لكن* بين عددي رؤسهن
و سهامهن موافقة بالنصف فرددنا عدد رؤس الاخوات الى
نصفها و هو ثلثة ثم طلبنا التوافق بين اعداد الرؤس و الرؤس
فلم نجده فضربنا وفق رؤس الاخوات و هو الثلثة في كل عدد
رؤس الجدات و هو الاربعة فحصل اثني عشر ثم ضربناها في
الاربعة التي هي مخرج فرض من لا يرد عليه فصار ثمانية
واربعين فمنها تصح المسئلة كان للزوجة واحد ضربناه في المضروب
الذي هو اثني عشر فلم يتغير فاعطيناها الزوجة و كان للمزوجات
ايضا واحد ضربناه في ذلك المضروب فكان اثني عشر فلكل
واحد منهن ثلثة و كان للاخوات لام اثنان فضربنا هما فيه

طوايف و هي ردية فاقسم مابقي من مخرج فرض من لا يرد
عليه على مسئلة من يرد عليه فان استقام الباقي من ذلك
المخرج على هذه المسئلة فبها و لا حاجة الى الضرب لان
الباقي حق من يرد عليهم بقدر سهامهم فيقسم على مسئلتهم
فما اصاب سهما واحدا فهو لصاحب ذلك السهم و ما اصاب
سهمين فهو لصاحبهما فاذا استقام الباقي على مسئلتهم لم
يحتج الى عمل ههنا في ذلك نعم يمكن ان يستقيم على
مسئلتهم و لا يستقيم ما اصاب كل جنس على عدد رؤسهم
فيحتاج هناك الى الضرب كما ستعرفه و هذا الذي ذكرناه
من كون الباقي في القسم الرابع مستقيما على مسئلة من يرد
عليه انما هو في صورة واحدة و ذلك لان الباقي من مخرج
فرض من لا يرد عليه اما واحد بان يكون مخرج فرضه اثنين
كما اذا اعطي الزوج النصف مع عدم الولد و لا شبهة في ان
الواحد انما يستقيم علي مسئلة من يرد عليه اذا كان مستحق
الرد شخصا واحدا فيكون المسئلة من القسم الثالث و اما ثلثة
بان تكون مخرج ذلك الفرض اربعة كما اذا اعطي الزوج
الربع مع وجود البنات او الزوجة مع عدمها فان كان صاحب
الربع الزوج فان كانت البنات مفردات فالمسئلة من القسم
الثالث ايضا و ان كن مع ذي فرض أخر فح تكون مسئلة
من يرد عليه ارباعا او اخماسا و لا تستقيم الثلثة علي شيئ من
الاربعة والخمسة و ان كانت صاحب الربع الزوجة يتصور
ههنا الاستقامة كما نذكره و اما سبعة كما اذا كان المخرج
ثمانية فتعطي المرأة ثمنها و تبقي سبعة و لا استقامة ههنا ايضا

ذلك الجنس الواحد كما كنت تقسم جميع المال على عدد رؤسهم اذا انفردوا ممن لايرد عليه فان استقام الباقي على عدد رؤس من يرد عليه فبها اي مرحبا بهذه الاستقامة و نعمت هي اذ لا حاجة الى ضرب كزوج و ثلث بنات اقل مخارج فرض من لايرد عليه اربعة فاذا اعطيت الزوج واحدا منها بقيت ثلثة و هي مستقيمة على عدد رؤس البنات و هو نظير ما مر في باب التصحيح من انه ان كانت سهام كل فريق منقسمة عليهم بلاكسر فلا حاجة الى ضرب و ان لم يستقم ذلك الباقي على عدد رؤس من يرد عليهم فاضرب على قياس ما مر في باب التصحيح وفق رؤسهن اي رؤس من يرد عليهم في مخرج فرض من لايرد عليه ان وافق رؤسهم ذلك الباقي فما حصل تصح منه المسئلة كزوج و ست بنات فان اقل مخرج فرض من لا يرد عليه اربعة فاذا اعطيت الزوج واحدا منها بقيت ثلثة فلا تستقيم على عدد رؤس البنات الست لكن بينهما موافقة بالثلث اذ لاعبرة للمداخلة كما عرفت فاضرب وفق عدد رؤسهن و هو اثنان في الاربعة يبلغ ثمانية فللزوج منها اثنان و للبنات ستة و الا اي ان لم يوافق عدد رؤسهم الباقي فاضرب كل عدد رؤسهن في مخرج فرض من لا يرد عليه فالمبلغ الحاصل من ضرب وفق الرؤس في ذلك المخرج على تقدير التباين تصحيح المسئلة * شريفيه

٩٥ و القسم الرابع من تلك الاقسام ان يكون مع الثالث مع اجتماع جنسين ممن يرد عليه من لايرد عليه و انما اكتفينا با جتماع جنسين بناء على ان الاستقراء دل على انه لا توجد مسئلة فيها اربع

ان يكون في المسئلة من لايرد عليه اولايكون فانحصرت
الاقسام في الاربعة احدها ان يكون في المسئلة جنس واحد
ممن يرد عليه ما فضل من الفروض عند عدم من لا يرد عليه و
على هذا التقدير فاجعل المسئلة من رؤسهم اى رؤس ذلك
الجنس الواحد لان جميع المال لهم بالفرض و الرد معا و رؤسهم
مماثلة فلا مزية لراس على آخر وذلك كما اذا ترك الميت
بنتين او اختين او جدتين فاجعل المسئلة من اثنين فاعط كل
واحدة منهما نصف التركة لتساويهما في الاستحقاق و رجوع
جميع المال اليهما على السوية فتكون القسمة على عدد الرؤس
كما في العصبات اعني اذا ترك ابنين او اخوين مثلا و ايضا
فرضهم يقسم على عدد رؤسهم فيقسم الكل كذلك ابتداء
قطعا لتطويل المسافة في القسمة شريفيه

٩٣ و القسم الثاني اذا اجتمع في المسئلة جنسان او ثلثة اجناس ممن
يرد عليه عند عدم من لايرد عليه فاجعل المسئلة من سهامهم
اي من مجموع سهام هؤلاء المجتمعين الما خوذة من مخرج
المسئلة او من خمسة اي اجعلها من خمسة اذا كان فيها ثلثان
و سدس كبنتين و ام فللبنتين سهام اربعة و للام سهم واحد
فتجعل التركة اخماسا اربعة منها للبنتين و واحد للام * شريفيه

٩٤ و في الصورة الثالثة ان تكون مع الاول اي مع الجنس الواحد
ممن يرد عليه من لايرد عليه يعني ان يكون في المسئلة جنس
واحد ممن يرد عليه و يكون معه من لايرد عليه كالزوج
و الزوجة فاعط فرض من لايرد عليه من اقل مخارجه و اقسم
الباقي من ذلك المخرج على عدد رؤس من يرد عليه اعني

الفصل السابع

٨٨ العول ان يزاد على المخرج شيئى من اجزائه كسدسه او ثلثه الى غيرذلك من الكسور الموجودة فيه اذا ضاق المخرج عن فرض و حاصله ان المخرج اذا ضاق عن الوفاء بالفروض المجتمعة فيه ترفع التركة الي عدد اكثر من ذلك المخرج ثم يقسم حتى يدخل النقصان في فرائض جميع الورثة على نسبة واحدة كما سياتيک تفصيله * شريفيه

٨٩ ثلثة منها قد تعول اما الستة فانها تعول الى عشرة وترا وشفعا و اما اثنى عشر فهي تعول الى سبعة عشر وترا لا شفعا و اما اربعة و عشرون فانها تعول الى سبعة و عشرين عولا واحدا * شريفيه

٩٠ اى تعول بنصف سدسها الى ثلثة عشر اذا اجتمع ربع و ثلثان و سدس كزوجة و اختين لاب و ام و اخت لام * شريفيه.

الفصل الثامن

٩١ الرد ضد العول اذ به تنتقص سهام ذوى الفروض و يزداد اصل المسئلة و بالرد تزداد السهام و ينقص اصل المسئلة و بعبارة اخرى في العول تفضل السهام على المخرج و في الرد يفضل المخرج علي السهام * شريفيه

٩٢ ثم مسائل الباب اي باب الرد عند من قال به اقسام اربعة و ذلک لان الموجود في المسئلة اما صنف واحد ممن يرد عليه ما فضل و اما اكثر من صنف واحد و على التقديرين اما

فانهما لا يرثان مع الاب و لكن يحجبان الام من الثلث
الى السدس * شريفيه

٨٧ من صالح من الورثة على شئ معلوم من التركة فاطرح
سهامه من التصحيح اى صح المسئلة مع وجود المصالح بين الورثة
ثم اطرح سهامه من التصحيح ثم اقسم باقي التركة اى مابقى
منها بعد ما اخذه المصالح على سهام الباقيين اى على سهام
باقي الورثة من التصحيح كزوج و ام و عم فالمسئلة مع وجود
الزوج من ستة و هى مستقمية على الورثة للزوج منها سهام
ثلثة و للام سهمان و للعم الباقي و هو سهم واحد فصالح الزوج
من نصيبه الذي هو النصف على ما في ذمته للزوجة من المهر
و خرج من البين فيقسم باقى التركة و هو ما عدا المهر بين
الام و العم اثلاثا بقدر سهامهما من التصحيح و ح يكون سهمان
من الباقي للام و سهم واحد للعم كما كان الحال كذلك
في سهامهما من التصحيح فان قلت هلا جعلت الزوج
بعد المصالحة و اخذه المهر و خروجه من البين بمنزلة المعدوم
و اي فائدة فى جعله داخلا في تصحيح المسئلة مع انه لا ياخذ
شيئا و راء ما اخذه قلت فائدته انا لو جعلناه كان لم يكن
و جعلنا التركة ما وراء المهر لا نقلب فرض الام من ثلث
اصل المال الى ثلث ما بقى اذ حينئذ يقسم الباقى بينهما
اثلاثا فيكون للام سهم و للعم سهمان و هو خلاف الاجماع
اذ حقها ثلث الاصل و اذا دخلنا الزوج في اصل المسئلة
كان للام سهمان من الستة و للعم سهم واحد فيقسم الباقى بينهما
على هذ الطريق فتكون مستوفية حقها من الميراث * شريفيه

المسئلة على عدد رؤسهم ثم اضرب الخارج من هذه القسمة في المضروب الذي ضربته في اصل المسئلة لاجل التصحيح فالحاصل من ضرب الخارج في المضروب نصيب كل واحد من آحاد ذلك الفريق * سراجيه

الفصل السادس

٨٤ الحجب على نوعين احدهما حجب نقصان و هو حجب عن سهم اكثر الى سهم اقل و حجب حرمان و هو ان يحجب من الميراث بالمرة فيصير محروما بالكلية فان قلت و قد يحجب هذا الفريق بالقتل و الردة و الرقية فلا يصح انهم لا يحجبون بحال البتة قلت الكلام في الورثة و هم على ذلك التقدير ليسوا بورثة * شريفيه

٨٥ و المحروم عن الميراث بالكلية لا يحجب عند نا غيره اصلا لا حجب حرمان و لا حجب نقصان وهو قول عامة الصحابة رض و المحجوب حجب حرمان يحجب غيره كلا الحجبين بالاتفاق * شريفيه

٨٦ روي ان امرأة مسلمة تركت زوجا مسلما و اخوين من امها مسلمين و ابنا كافرا فقضى فيها عليٌّ و زيد بن ثابت رض بان للزوج النصف و لاخويها الثلث و مابقي فهو للعصبة و المحجوب حجب حرمان يحجب غيره كلا الحجبين بالاتفاق بيننا و بين ابن مسعود رض كا لاثنين من الاخوة والاخوات فصاعدا من اي جهة كانا اى من الابوين او من احدهما

اثنان و ثلثة و خمسة و سبعة و هذه كلها اعداد مباينة فضربنا
الاثنين في الثلثة صار ستة ثم ضربنا هذا المبلغ في خمسة فصار
ثلثين ثم ضربنا الثلثين في السبعة فحصلت مايتان و عشرة
ثم ضربنا هذا المبلغ في اصل المسئلة و هو اربعة و عشرون فصار
المجموع خمسة الاف و اربعين و منها تستقيم المسئلة على
جميع الطوايف اذ كانت للزوجين من اصل المسئلة ثلثة فضربناها
في المضروب الذي هو مايتان و عشرة فحصلت ست ماية
و ثلثون فلكل واحدة منهما ثلث ماية و خمسة عشر و كانت
للجدات الست اربعة و قد ضربناها في ذلك المضروب فصار
ثمانماية و اربعين فلكل واحدة منهن ماية و اربعون و كانت
للبنات العشر ستة عشر ضربناها في المضروب المذكور فبلغ ثلث
آلاف و ثلثماية و ستين فلكل واحدة منهن ثلثماية و ستة و
ثلثون و كان للاعمام السبعة واحد ضربناه في ذلك المضروب
فكان مايتين و عشرة فلكل واحدة منهم ثلثون و مجموع هذه
الانصباء خمسة آلاف و اربعون * شريفيه

٨٢ و اذا اردت ان تعرف نصيب كل فريق كالبنات و الجدات
و الزوجات و الاعمام و غيرهم من التصحيح الذى استقام على
الكل فاضرب ما كان لكل فريق من اصل المسئلة فيما ضربته
في اصل المسئلة اي في المضروب الذى ضربته في اصلها فما حصل
من هذا الضرب كان نصيب ذلك الفريق * سراجيه

٨٣ و اذا اردت ان تعرف نصيب كل واحد من آحاد ذلك
الفريق من التصحيح فاقسم ما كان لكل فريق من اصل

فلكل من الزوجات الاربع ماية و خمسة و ثلثون و كانت
البنات الثماني عشر ستة عشر و قد ضربناها في ذلك المضروب
ايضا فصار الفين و ثمان ماية و ثمانين فلكل واحدة منهن ماية
و ستون و كانت للجدات الخمس عشر اربعة و قد ضربناها في
المضروب المذكور فصار سبع ماية و عشرين فلكل منهن ثمانية
و اربعون و كان للاعمام الستة واحد فضربناه في المضروب فكان
ماية و ثمانين فلكل واحد منهم ثلثون و اذا جمعت جميع
انصباء الورثة بلغ اربعة آلاف و ثلثماية و عشرين * شريفية

٨١ و الاصل الرابع من الاربعة ان تكون الاعداد اي اعداد رؤس من
انكسرت عليهم سهامهم من طايفتين او اكثر متباينة لايوافق
بعضها بعضا فالحكم فيها ان يضرب احد الاعداد في جميع الثاني
ثم تضرب ما بلغ في جميع الثالث ثم تضرب مابلغ في جميع
الرابع ثم تضرب ما اجتمع في اصل المسئلة كامرأتين و ست
جدات و عشر بنات و سبعة اعمام اصل المسئلة اربعة و عشرون
فللزوجتين الثمن و هو ثلثة لا يستقيم عليهما و بين رؤسهما
و سهامهما مباينة فاخذنا عدد رؤسهما و هو اثنان وللجدات
الست السدس و هو اربعة فلا يستقيم عليهن و بين عددي
رؤسهن و سهامهن موافقة بالنصف فاخذنا نصف عدد رؤسهن
و هو ثلثة و للبنات العشر الثلثان و هو ستة عشر فلا يستقيم
عليهن و بين رؤسهن و سهامهن موافقة بالنصف فاخذنا نصف
عدد رؤسهن و هو خمسة و للاعمام السبعة الباقي و هو واحد
ولا يستقيم عليهم وبينه و بين عدد رؤسهم مباينة فاخذنا
عدد رؤسهم و هو سبعة فصار معنا من الاعداد الماخوذة للروس

كذلك اي في وفقه ان وافق المبلغ الثاني او في جميعه ان لم
يوافق ثم يضرب المبلغ الثالث في اصل المسئلة كاربع زوجات
و ثماني عشر بنتا و خمس عشر جدة و ستة اعمام اصل المسئلة
اربعة و عشرون للزوجات الاربع الثمن و هو ثلاثة فلا تستقيم
عليهن وبين عددي سهامهن ورؤسهن مباينة فحفظنا جميع عدد
رؤسهن وللنبات الثماني عشر الثلثان و هو ستة عشر فلا تستقيم
عليهن و بين عددي رؤسهن و سهامهن موافقة بالنصف فاخذنا
نصف عدد روسهن و هو تسعة و حفظناها و للجدات الخمس
عشر السدس و هو اربعة فلا تستقيم عليهن و بين عددي رؤسهن
و سهامهن مباينة فحفظنا جميع عدد رؤسهن و للاعمام الستة
الباقي و هو واحد ولا يستقيم عليهم و بينه و بين عدد رؤسهم
مباينة فحفظنا جميع عدد رؤسهم فحصل لنامن اعداد الرؤس
المحفوظة اربعة و ستة و تسعة و خمسة عشر ثم طلبنا بينهما اي
بين الاربعة و الستة التوافق فوجدنا الاربعة موافقة للستة
بالنصف فرددنا احد هما الى نصفها و ضربناه في الاخرى
صار المبلغ اثني عشر و هو موافق للتسعة بالثلث فضربنا
ثلث احد هما في جميع الآخر صار المبلغ ستة و ثلثين و بين
هذا المبلغ الثاني و بين خمسة عشر موافقة بالثلث ايضا نضربنا
ثلث خمسة عشر و هو خمسة في ستة و ثلثين فحصلت ماية
و ثمانون ثم ضربنا هذا المبلغ الثالث في اصل المسئلة اعني
اربعة و عشرين صار الحاصل اربعة آلاف و ثلثماية و عشرين فمنها
تصح المسئلة اذ كانت للزوجات من اصل المسئلة ثلثة ضربناها
في المضروب و هو ماية و ثمانون فحصل خمس ماية و اربعون

جدات و اثنا عشر غما اصل المسئلة من اثني عشر للجدات
الثلث السدس وهو اثنان فلا يستقيم عليهن وبين روسهن
وسها مهن مباينة فاخذنا مجموع عدد رؤسهن و هو ثلثة
و للزوجات الاربع الربع و هو ثلثة فلا استقامة و بين عددي
رؤسهن و سهامهن مباينة فاخذنا عدد رؤسهن و هو اربعة
و للاعمام الباقي و هو سبعة فلا تستقيم على اثني عشر بل
بينهما تباين فاخذنا عدد الرؤس باسره ثم طلبنا النسبة بين
اعداد الرؤس الما خوذة فوجدنا الثلثة و الاربعة متداخاين
في اثني عشر الذي هو اكثر اعداد الرؤس فضربناه في اصل
المسئلة و هو ايضا اثنا عشر فصارماية واربعة و اربعين فتصح
منها المسئلة اذ كان للجدات من اصل المسئلة اثنان و قد
ضربنا هما في المضروب الذي هو اثنا عشر فصار اربعة و عشرين
فلكل واحدة منهن ثمانية و للزوجات من اصل المسئلة ثالثة
ضربنا ها في المضروب المذكور صار ستة و ثلثين فلكل واحدة
منهن تسعة وللاعمام سبعة ضربنا ها في اثناعشر ايضا فحصلت
اربعة و ثمانون فلكل واحد منهم سبعة * شريفيه

٨ و الثالث من الاربعة ان يوافق بعض الاعداد اي بعض اعداد
رؤس من انكسرت عليهم سهامهم من طايفتين او اكثر بعضا
فالحكم فيها اي في هذه الصورة ان يضرب و فق احد الاعداد
اي اعداد رؤسهم في جميع العدد الثاني ثم يضرب جميع ما
بلغ في و فق العدد الثالث ان وافق ذلك المبلغ الثالث و الا
فالمبلغ اي ان لم يوافق المبلغ الثالث فح يضرب المبلغ في
جميع العدد الثالث ثم يضرب المبلغ الثاني في العدد الرابع

وفقها ايضا فانه اذا كانت بين روس طائفة وسهامهم مثلا
موافقة يرد عدد روسهم الى وفقه اولا ثم تعتبر المماثلة بينه
وبين ساير الاعداد كما ستطلع عليه فالحكم فيها اي في هذه
الصورة ان يضرب احد الاعداد المماثلة في اصل المسئلة فيحصل
ما تصح به المسئلة على جميع الفرق مثل ست بنات و
ثلث جدات وثلثة اعمام المسألة من ستة للبنات الست
الثلثان وهو اربعة لا يستقيم عليهن لكن بين الاربعة وعدد
روسهن موافقة بالنصف فاخذنا نصف عدد روسهن هو ثلثة
وللجدات الثلث السدس وهو واحد ولا تستقيم عليهن ولا
موافقة بين الواحد وعدد روسهن فاخذنا جميع عدد روسهن
وهو ايضا ثلثة وللاعمام الثلثة الباقي وهو واحد ايضا وبينه
وبين عدد روسهم مباينة فاخذنا جميع عدد روسهم ثم نسبنا
هذه الاعداد الماخوذة بعضها الى بعض فوجدناها مماثلة
فضربنا احدها وهو ثلثة في اصل المسئلة اعني الستة فصارت
ثمانية عشر فمنها تستقيم المسئلة اذ قد كانت للبنات اربعة
ضربناها في المضروب الذي هو ثلثة فصار اثني عشر فلكل
واحدة منهن اثنان وللجدات واحد ضربناه ايضا في ثلثة فصار
ثلثة فلكل واحدة واحد وللاعمام واحد ايضا ضربناه في الثلثة
ايضا واعطينا كل واحد منهم واحدا * شربفيه
٧٦ الثاني من الاربعة ان يكون بعض الاعداد اي بعض اعداد روس
الورثة المنكسرة عليهم سهامهم من طايفتين او اكثر متداخلا
في البعض فالحكم فيها اي في هذه الصورة ان يضرب ما هو
اكثر تلك الاعداد في اصل المسئلة كاربع زوجات وثلث

نصيبهم من التركة و لكن بين سهامهم و رؤسهم موافقة بكسر
من الكسور فيضرب وفق عدد رؤس من انكسرت عليهم
السهام و هم تلك الطائفة الواحدة في اصل المسئلة ان لم تكن
عائلة و في اصلها و عولها معا ان كانت عائلة كابوين و عشر
بنات او زوج و ابوين و ست بنات فالاول مثال ما ليس
فيها عول اذ اصل المسئلة من ستة السدسان و هما اثنان
للابوين و يستقيمان عليهما و الثلثان و هما اربعة للبنات العشر
و لا تستقيم عليهن لكن بين الاربعة و العشرة موافقة بالنصف
فان العدد العاد لهما هو الاثنان فرددنا عدد الرؤس اعني العشرة
الى نصفها و هو خمسة فضربنا ها في الستة التي هي اصل
المسئلة صار الحاصل ثلثين فتصح منه المسئلة اذ كان للابوين
من اصل المسئلة سهمان و قد ضربنا هما في المضروب الذى هو
خمسة صار عشرة فلكل منهما خمسة و كانت للبنات منه
اربعة و قد ضربنا ها ايضا في خمسة فصار عشرين فلكل واحدة
منهن اثنان * شريفيه

٧٧ و الثالث من الاصول الثلثة ان تنكسر السهام ايضا على
طائفة واحدة فقط و لاتكون بين سهامهم و رؤسهم موافقة بكسر
بل مباينة فيضرب حينئذ كل عدد رؤس من انكسرت عليهم
السهام في اصل المسئلة * شريفيه

٧٨ و اما الاصول الاربعة التي بين الرؤس و الرؤس فاحدها ان يكون
الكسر اي كسر السهام على طائفتين من الورثة او اكثر و لكن
بين اعداد رؤسهم اي رؤس من انكسرت عليهم سهامهم
مماثلة و المراد باعداد الرؤس ما يتناول عين تلك الاعداد و

او اختلط بالثلث فقط كزوجة و بنتين او بالسدس فقط كزوجة
و ام و ابن هو عصبة او بالثلث فقط كزوجة و ابن رقيق واختين
لام على رايه ايضا فهو من اربعة و عشرين * شريفيه
٦٧ اما الستة فتعول الي عشرة وترا و شفعا * سراجيه
٦٨ اما اثنى عشر فهي تعول الى سبعة عشر وترا لاشفعا * سراجيه
٦٩ اما اربعة و عشرون فانها تعول الى سبعة و عشرين عولا
واحدا * سراجيه

الفصل الخامس

٧٠ تماثل العددين كون احدهما مساويا للآخر * سراجيه
٧١ و تداخل العددين ان يعد اقلهما الاكثر اى يفنيه * سراجيه
٧٢ و توافق العددين ان لايعدّ اقلهما الاكثر و لكن يعدهما
عددثالث * سراجيه
٧٣ و تباين العددين ان لايعد العددين المختلفين معا عدد
ثالث اصلا * سراجيه
٧٤ يحتاج في تصحيح المسايل الى سبعة اصول ثلثة منها بين السهام
و الرؤس و اربعة منها بين الرؤس و الرؤس * سراجيه
٧٥ اما الاصول الثلثة فاحدها ما ذكره بقوله ان كانت سهام كل
فريق من الورثة منقسمة عليهم بلا كسر فلا حاجة الى الضرب
كابوين و بنتين فان المسئلة من ستة فلكل واحد من الابوين
سدسها و هو واحد و للبنتين الثلثان اعني اربعة فلكل واحد
منهما اثنان فاستقامت السهام على رؤس الورثة بلا انكسار * شريفيه
٧٦ و الثاني من الاصول الثلثة ان ينكسر على طائفة واحدة فقط

و لا يرثن مع الصلبيتين *　　　سراجيه

٦٤ الثاني اي بالثلثين و الثلث و السدس كما اذا تركت زوجا و اما و اختين لاب و ام و اختين لام او ببعضه كما اذا اختلط بالثلث فقط كما فيمن خلفت زوجا و اختين لام او اختلط بالثلثين فقط كما فيمن خلفت زوجا و اختين لاب و ام او اختلط بالسدس وحده كما اذا خلف اما و بنتا او اختلط بالثلث و الثلثين معا كما اذا تركت زوجا و اختين لاب و ام و اختين لام او اخلتط با الثلثين و السدس معا كما اذا تركت زوجا و اختين لاب و ام و اما او اختلط بالثلث و السدس كما فيمن تركت زوجا و اختين لام و اما فهو اي اختلاط النصف في جميع هذه الصور من ستة *　　　شريفيه

٦٥ و اذا اختلط الربع من النوع الاول بكل النوع الثاني اي بالثلثين و الثلث و السدس كما اذا خلف زوجة و اما و اختين لاب و ام و اختين لام او ببعضه كما اذا اختلط بالثلثين فقط كزوج و بنتين او بالثلث فقط كزوجة و ام او بالسدس فقط كزوجة و واحد من اولاد الام او اختلط بالثلثين و السدس معا كزوجة و ام و اختين لاب و ام او بالثلثين و الثلث كزوجة و اختين لاب و ام و اختين لام او بالثلث و السدس كزوجة و ام و اختين لام فهو من اثني عشر *　　　شريفيه

٦٦ او اختلط الثمن ببعضه اي ببعض النوع الثاني كما اذا اختلط بالثلثين و السدس كزوجة و بنتين و ام او بالثلث و السدس كزوجة و ام و اختين لام و ابن محروم او بالثلثين و الثلث على رايٍ ايضا كزوجة و ابن كافرا و اختين لاب و ام و اختين لام

الغير بحيث لم يثبت نسبه من ذلك الغير اذا مات المقر
مصراً على اقراره * سراجيه

٥٦ ثم الموصى له بجميع المال ثم بيت المال * سراجيه

الفصل الرابع

٥٧ و اذا اجتمع فيها الربع و النصف كما اذا ترك زوجا و بنتا
كانت من اربعة * سراجيه

٥٨ و اذا اجتمع في المسئلة الثمن مع النصف كما اذا ترك زوجة
و بنتا كانت من ثمانية * سراجيه

٥٩ للزوجات حالتان الربع للواحدة فصاعدا عند عدم الولد
و و لدالابن و ان سفل والثمن مع الولد و و لدالابن و ان سفل
و اما للزوج فحالتان النصف عند عدم الولد و و لدالابن
و ان سفل و الربع مع الولد و و لدالابن و ان سفل * سراجيه

٦٠ فاذا اجتمع في المسئلة السدس و الثلث كما اذا ترك اما
واختين لام كانت من ستة * شريفيه

٦١ و كذا اذا اجتمع فيها السدس و الثلثان كما اذا ترك اما واختين
لاب و ام او اجتمع فيها السدس و الثلثان و الثلث كما اذا
ترك اما و اختين لاب و ام و اختين لام فهي من ستة * شريفيه

٦٢ و اما اذا اجتمع فيها الثلث و الثلثان كما اذا ترك اختين
لام و اختين لاب و ام فهي من ثلثة * شريفيه

٦٣ و بنات الابن كبنات الصلب و لهن احوال ست النصف
للواحدة و الثلثان للاثنين فصاعدا عند عدم بنات
الصلب و لهن السدس مع الواحدة الصلبية تكملة للثلثين

اعني من كان لاب و ام اولى ممن كان لاب و من كان لاب
اولى ممن كان لام ذكورا كانوا او اناثا و ان كانوا ذكورا و اناثا
و استوت قرابتهم فللذ كر مثل حظ الانثيين كعم و عمة كلاهما
لام او خال و خالة لاب و ام اولاب اوام فان كان حيز قرابتهم
مختلفا فلا اعتبار بقوة القرابة كعمة لاب و ام و خالة لام او خالة
لاب و ام و عمة لام فالثلثان بقرابة الاب و هو نصيب
الاب و الثلث بقرابة الام و هو نصيب الام ثم ما اصاب كل
فريق يقسم بينهم كمالوا عتبر حيز قرابتهم * سراجيه
٥٣ الحكم فيهم كالحكم في الصنف الاول اعني اولاهم بالميراث
اقربهم الى الميت من اي جهة كان و ان استووا في القرب
و كان حيز قرابتهم متحدا فمن كان له قوة القرابة فهو اولى
بالاجماع و ان استووا في القرب و القرابة و كان حيز قرابتهم
متحدا فولد العصبة اولى ممن لايكون كبنت العم و ابن العمة
كلاهما لاب و ام اولاب المال كله لبنت العم و ان كان احدهما
لاب و ام و الاخر لاب كان المال كله لمن كان له قوة القرابة
في ظاهر الرواية قياسا على خالة لاب مع كونها و لد ذي
الرحم تكون هي اولى * سراجيه
٥٤ و عند محمد رح يقسم المال على اول بطن اختلف مع اعتبار
عدد الفروع و الجهات في الاصول كما في الصنف الاول ثم
ينتقل هذا الحكم الى جهة عمومة ابويه و خوولتهما ثم الى
اولادهم ثم الى جهة عمومة ابوى ابويه و خوو لتهما ثم الى
اولادهم كما في العصبات * سراجيه
٥٥ ثم ذوي الارحام ثم موالى الموالات ثم المقرله بالنسب على

الاستواء في درجات القرب فمن كان يدلي الى الميت بوارث
فهو اولى و ان استوت منا زلهم و ليس فيهم من يدلى بوارث
او كان كلهم يدلون بوارث فان اتفقت صفة من يدلون
و اتحدت قرابتهم فالقسمة على ابدانهم و ان اختلفت صفة
من يدلون بهم يقسم المال على اول بطن اختلف كما في
الصنف الاول و ان اختلفت قرابتهم فالثلثان لقرابة الاب
و هو نصيب الاب و الثلث لقرابة الام و هو نصيب الام
ثم ما اصاب كل فريق يقسم بينهم كمالو اتحدت
قرابتهم * سراجيه

٥١ الحكم فيهم كالحكم في الصنف الاول اعني اولاهم بالميراث اقربهم
الى الميت و ان استووا في القرب فولد العصبة اولى من ولد
ذوي الارحام كبنت ابن اخ و ابن بنت اخت كلاهما لاب
و ام او احدهما لاب و ام و الاخر لاب المال كله لبنت ابن
الاخ لانها ولد العصبة و ان استووا في القرب و ليس فيهم ولد
عصبة او كان كلهم اولاد العصبات او كان بعضهم اولاد العصبات
و بعضهم اولاد اصحاب الفرائض و اختلفت قرابتهم فابو
يوسف رح يعتبر الاقوى و محمد رح يقسم المال على الاخوة
و الاخوات نصفين مع اعتبار عدد الفروع و الجهات في
الاصول فما اصاب كل فريق يقسم بين فروعهم كما في
الصنف الاول * سراجيه

٥٢ الحكم فيهم انه اذا انفرد واحد منهم استحق المال كله لعدم
المزاحم و اذا اجتمعوا و كان حيز قرابتهم متحدا كالعمات
و الاعمام لام او الاخوال و الخالات فالاقوى منهم اولى بالاجماع

اولى من ولد ذوي الارحام كبنت بنت الابن اولى من ابن بنت البنت و ان استوت درجاتهم و لم يكن فيهم ولد الوارث او كان كلهم و لد الوارث فعند ابي يوسف رح و الحسن ابن زياد يعتبر ابدان الفروع و يقسم المال عليهم سواء اتفقت صفة الاصول في الذكورة و الانوثة او اختلفت و محمد رح يعتبر ابدان الفروع ان اتفقت صفة الاصول موافقا لهما و يعتبر ابدان الاصول ان اختلفت صفاتهم و يعطي الفروع ميراث الاصول مخالفا لهما كما اذا ترك ابن بنت و بنت بنت عند هما المال بينهما للذكر مثل حظ الانثيين باعتبار الابدان و عند محمد رح كذلک لان صفة الاصول متفقة و لو ترک بنت ابن بنت و ابن بنت بنت عند هما المال بين الفروع اثلاثا باعتبار الابدان ثلثاه للذكر و ثلثه للانثى و عند محمد رح المال بين الاصول اعني في البطن الثاني اثلاثا ثلثاه لبنت ابن البنت نصيب ابيها و ثلثه لابن بنت البنت نصيب امه و كذلک عند محمد رح اذا كان اولاد البنات مختلفة يقسم المال على اول بطن اختلف في الاصول ثم يجعل الذكور طائفة و الاناث طائفة اخرى بعد القسمة فما اصاب الذكور يجمع و يقسم على اعلى الخلاف الذي وقع في اولاد هم و كذلک ما اصاب الاناث و هكذا يعمل الى ان ينتهى و قول محمد رح اشهر الروايتين عن ابي حنيفة رح في جميع احكام ذوي الارحام و هو قول ابي يوسف رح الاول ثم رجع فقال لاعبرة للاصول البتة * سراجيه

٥٠ اولاهم بالميراث اقربهم الى الميت من اىّ جهة كان و عند

۴۰ و احدة كانت او اكثر اذا كن ثابتات متحاذيات في الدرجة * سراجيه

۴۱ و الجدة القربى من ايّ جهة كانت تحجب الجدة البعدى من ايّ جهة كانت * سراجيه

۴۲ و الجدة الصحيحة و هي التي لايدخل في نسبتها الى الميّت جد فاسد * سراجيه

۴۳ الفصل الثالث

و ذو الرّحم هو كل قريب ليس بذي سهم و لا عصبة كانت عامة الصحابة يرون توريث ذوى الارحام و به قال اصحابنا و من تابعهم رحمهم الله تعالى الاول ينتمي الى الميت و هم اولاد البنات و اولاد بنات الابن * سراجيه

۴۴ و الصنف الثاني ينتمي اليهم الميت و هم الاجداد الساقطون و الجدات الساقطات * سراجيه

۴۵ و الصنف الثالث ينتمي الى ابوي الميت و هم اولاد الاخوات و بنات الاخوة و بنو الاخوة لام * سراجية

۴۶ و الصنف الرّابع ينتمي الى جدى الميت ا و جدتيه و هي العمات و الاعمام لام و الاخوال و الخالات * سراجيه

۴۷ فهؤلاء و كلّ من يدلى الى الميت بهم من ذوي الارحام * سراجيه

۴۸ ثم بالعصبات من جهت النّسب ثم بالعصبة من جهة السبب و هو مولى العتاقة ثم عصبته * سراجيه

۴۹ اولهم بالميراث اقربهم الى الميت كبنت البنت فانها اولى من بنت بنت الابن و ان استووا في الدرجة فولد الوارث

لاب و ام تكملة للثلثين * سراجيه

٢٨ولا يرثن مع الاختين لاب وام سراجيه

٢٩ الا ان يكون معهن اخ لاب فيعصبهنّ و يكون الباقي بينهن للذكر مثل حظ الانثيين * سراجيه

٣٠ ذكورهم و اناثهم في القسمة و الاستحقاق سواء * سراجيه

٣١ السدس للواحدة و الثلث للاثنين فصاعدا و يسقطون بالولد و ولدالابن و ان سفل و بالاب و بالجد بالاتفاق * سراجيه

٣٢ الفرض المطلق و هو السدس و ذلك مع الابن اوابن الابن و ان سفل و الفرض و التعصيب معا و ذلك مع الابنة او ابنة الابن و ان سفلت و التعصيب المحض و ذلك عند عدم الولد و ولد الابن و ان سفل * سراجيه

٣٣ اما للام فاحوال ثلث السدس مع الولد او ولد الابن و ان سفل او مع الاثنين من الاخوة و الاخوات فصاعدا من ايّ جهة كان * سراجيه

٣٤ و ثلث الكل عند عدم هؤلاء المذكورين و ثلث ما بقى بعد فرض احد الزوجين و ذلك في مسئلتين زوج و ابوين او زوجة و ابوين و لو كان مكان الاب جد فللام ثلث جميع المال * سراجيه

٣٥ ويسقط الجد بالاب لان الاب اصل في قرابة الجد الى الميت * سراجيه

٣٦ و الجد الصحيح كالاب * سراجيه

٣٧ و يسقطن كلهن بالام و الابويات أيضا بالاب * سراجيه

٣٨ و كذلك بالجد الاام الاب * سراجيه

٣٩ و للجدة السدس لام كانت او لاب * سراجيه

١٥ و اما للزوج فحالتان النصف عند عدم الولد و ولد الابن
وان سفل و الربع مع الولد او ولد الابن و ان سفل * سراجيه
١٦ فاما لبنات الصلب فاحوال ثلث النصف للواحدة * سراجيه
١٧ و الثلثان للاثنين فصاعدا * سراجيه
١٨ وبنات الابن كبنات الصلب ولهن احوال ست النصف للواحدة
و الثلثان للاثنين فصاعدا عند عدم بنات الصلب * سراجيه
١٩ لهن السدس مع الواحدة الصلبية تكملة للثلثين و لا يرثن
مع الصلبيتين * سراجيه
٢٠ الا ان يكون بحذائهن او اسفل منهن غلام فيعصبهن و الباقي
بينهن للذكر مثل حظ الانثيين * سراجيه
٢١ و بنو الاعيان و بنو العلات كلهم يسقطون بالابن و ابن الابن
وان سفل و بالاب بالاتفاق وبالجد عند ابى حنيفة رح * سراجيه
٢٢ و اما للاخوات لاب و ام فاحوال خمس مع الاخ لاب و ام
للذكر مثل حظ الانثيين فيصرن به عصبة لاستوائهم في
القرابة * سراجيه
٢٣ النصف للواحدة * سراجيه
٢٤ و الثلثان للاثنين فصاعدا * سراجيه
٢٥ و لهن الباقي مع البنات او بنات الابن لقوله عليه الصلوة
والسلام و اجعلوا الاخوات مع البنات عصبة * سراجيه
٢٦ و يسقط بنو العلات ايضا بالاخ لاب و ام و اما لاولاد الام فاحوال
ثلث ويسقطون بالولد وولد الابن و ان سفل وبالاب و
بالجد بالاتفاق سراجيه
٢٧ و الاخوات لاب كالاخوات لاب و ام ولهن السدس مع الاخت

٩ و فريق يرثون بحال و يحجبون بحال و هذا مبني على اصلين احد هما هو ان كل من يدلى الى الميت بشخص لا يرث مع و جود ذلك الشخص كابن الابن مع الابن سوى اولاد الام فانهم يرثون معها لانعدام استحقاقها جميع التركة والثاني الاقرب فالاقرب كما ذكرنا في العصبات * سراجيه

١٠ ثم بالعصبات من جهة النسب و العصبة كل من ياخذ من التركة ما ابقته اصحاب الفرائض و عند الانفراد يحرز جميع المال * سراجيه

١١ وحجب حرمان والورثة فيه فريقان فريق لا يحجبون بحال البتة و هم ستة الابن و الاب و الزوج و البنت و الام والزوجة * سراجيه

١٢ و مع الاخ لاب و ام للذكر مثل حظ الانثيين و اما لاولاد الام فاحوال ثلث ذكورهم و اناثهم في القسمة و الاستحقاق سواء * سراجيه

١٣ اما للاب فاحوال ثلث الفرض المطلق و هو السدس و ذلك مع الابن او ابن الابن و ان سفل والفرض والتعصيب معا و ذلك مع الابنة او ابنة الابن و ان سفلت و التعصيب المحض و ذلك عند عدم الولد و ولد الابن و ان سفل و اما للاخوات لاب و ام فاحوال خمس و اما البنات الصلب فاحوال ثلث * سراجيه

١٤ الفصل الثاني

للزوجات حالتان الربع للواحدة فصاعدا عند عدم الولد و ولد الابن وان سفل والثمن مع الولد او ولد الابن و ان سفل * سراجيه

باب الوراثة

الفصل الاول من باب الوراثة

١ تتعلق بتركة الميت حقوق اربعة مرتبة * سراجيه

٢ اولا. هم بالميراث جزء الميت اي البنون ثم بنو هم و ان سفلوا * سراجيه

٣ مع الابن للذكر مثل حظ الانثيين و هو يعصبهن * سراجيه

٤ و لا تجوز لوارثه الا ان يجيزه الورثة * هدايه

٥ ثم تقضي ديونه من جميع مابقي من ماله ثم تنفذ وصاياه من ثلث مابقي بعد الدين ثم يقسم الباقي بين ورثته بالكتاب و السنة و اجماع الامة * سراجيه

٦ المانع من الارث اربعة الرق وافرا كان او ناقصا و القتل الذي يتعلق به وجوب القصاص اوالكفارة واختلاف الدينين و اختلاف الدارين * سراجيه

٧ و ليس اختلاف الدار بمانع من الارث عند الشافعي رح اصلا و هو عندنا مانع فيما بين الكفار دون المسلمين * الشريفيه

٨ فيبدء باصحاب الفرائض و هم الذين لهم سهام مقدرة في كتاب الله تعالى و اصحاب هذه السهام اثني عشر نفرا اربعة من الرجال و هم الاب و الجد الصحيح و ان علا و الاخ لام و الزوج و ثمان من النسا و هن الزوجة و البنت و بنت الابن و ان سفلت و الاخت لاب و ام و الاخت لاب و الاخت لام و الام والجدة الصحيحة * سراجيه

APPENDIX.



INHERITANCE.

No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
1	Shah ool huq (Pauper) *versus* Mooneebool huq,	Patna Court of Appeal,	Aug. 22, 1818.
2	Musst. Beebee Kanoo *v.* Ali Shah,	Zillah Aligurh,	July 20, 1816.
3	Musst. Nasoo *v.* Khadim Ali,	Zillah Behar,	July 21, 1814.
4	Jhujhoo and others *v.* Musst. Ilahee Begum,	Zillah Bareilly,	Sept. 5, 1821.
5	Wujeehoonisa Khanum and another *v.* Mirza Hoosein Ali,	Sudder Dewanee Adawlut,	Dec. 5, 1808.
6	Busti Khan (Pauper) *v.* Mina Beebee,	Zillah Hooghly,	March 7, 1815.
7	Shah Abadee *v.* Shah Ali Nuqee,	Sudder Dewanee Adawlut,	July 14, 1803.
8	*	Calcutta Court of Appeal,	Aug. 13, 1821.
9	Musst. Budlee *v.* Roushun,	City of Benares,	Jan. 5, 1815.
10	Suda *v.* Fukeera and others,	Zillah Bareilly,	Sept. 21, 1818.
11	Beebee Jaun and Beebee Mooneefa *v.* Fyz Khan and others,	Patna Court of Appeal,	May 11, 1821.
12	Moonuwurnisa and others *v.* Zuman Khan and others,	Bareilly Court of Appeal,	Nov. 23, 1820.
13	Musst. Shurfoonisa and others *v.* Imamee Khanum,	City of Moorshedabad,	April 16, 1813.
14	Musst. Bheekun (Pauper) *v.* Meer Jafur and others,	Patna Court of Appeal,	July 29, 1814.
15	Musst. Munnee *v.* Zahir and others,	Zillah Bareilly,	May 19, 1819.
16	Ruhum Ali *v.* Shah Shumsoodeen and others,	Zillah Shahabad,	April 26, 1810.
17	Wajid Shah and others *v.* Imam Khan and others,	Zillah Furruckabad,	July 20, 1818.

* Wherever I have left a blank space, the requisite information was not readily procurable, and I did not consider its attainment of such material consequence as to warrant any delay in the publication.

No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
18	Musst. Joohoo v. Mihr Ali,	Patna Court of Appeal,	Sept. 17, 1819.
19	Musst. Munnee v. Zahir and others,	Zillah Bareilly,	May 19, 1819.
20	Furzund Ali v. Mirza Sulamut Hoosein,	Zillah Sarun,	Sept. 21, 1812.
21		Zillah 24-Pergunnahs,	Feb. 9, 1819.
22	Zuhooroonisa and others v. Mehndee Ali Khan and others,	Patna Court of Appeal,	April 15, 1814.
23	Moohummud Ameenoodeen Khan and others v. Moohummud Husroodeen,	Dacca Court of Appeal,	Nov. 6, 1821.
24	Sheikh Fuseeh oollah v. Meer Moonuwur Ali and others,	Patna Court of Appeal,	July 20, 1814.
25	Chumroo and others v. Panchoo and others,	City of Patna,	July 16, 1807.
26	Mirza Shumsoodeen and others v. Musst. Rumjoo and others,	Patna Court of Appeal,	May 19, 1814.
27	Munnoo Beebee and others v. Burkut oollah and others,	Zillah Burdwan,	Dec. 26, 1821.
28	Sheikh Ahmud v. Munna Khan and others,	Zillah Chittagong,	July 30, 1821.
29	Mirza Sudderoodeen v. Meer Shah Ali,	Zillah Shahabad,	Nov. 7, 1807.
30	Wujeehoonisa Khanum and another v. Mirza Hoosein Ali,	Sudder Dewanee Adawlut,	Dec. 5, 1808.
31	Mooteeoollah v. Moohummud Katil and others,	Zillah Nuddea,	March 12, 1817.
32	Sheikh Jaunoo v. Sheikh Joomlah,	City of Dacca,	July 13, 1815.
33		Zillh. Chittagong,	Jan. 3, 1816.
34	Musst. Ruheemun v. Musst. Noorun and others,	City of Moorshedabad,	April 20, 1819.
35	Husrut oollah Khan v. Syud Moortuza Khan,	Zillah 24-Pergunnahs,	July 18, 1807.
36	Nizamoodeen v. Musst. Izzut and others,	Bareilly Court of Appeal,	Nov. 29, 1820.
37		Zilh. Chittagong,	June 27, 1817.
38	Musst. Chand Beebee v. Moohummud Tuqee,	Sudder Dewanee Adawlut,	Aug. 27, 1812.
39	Moohummud Hafiz v. Moohummud Newaz,	Zillah Mymunsingh,	June 24, 1817.
40	Amaun Beebee and others v. Rumzaun Ali and others,	Zillah Backergunge,	Dec. 24, 1821.

No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
41	Musst. Yakeeda Khanum v. Mirza Jhuboo,	City of Dacca,	May 13, 1803.
42	Ahmud oollah v. Door Ali & others.	Zillah Hooghly,	July 19, 1820.
43		Zillah Hooghly,	March 15, 1819.
44	Moohummud Zuman v. Durbaree Sipahee,	Zillah Mymunsingh,	Oct. 2, 1820.
45	Chutter Das v. Roushun,	City of Benares,	June 24, 1815.
46	Ameer Ali v. Buhadoor Hoosein and others,	Patna Court of Appeal,	March 27, 1818.
47	Manikchund v. Tiloke Singh and others,	Zillah Sylhet,	Feb. 27, 1822.
48	Musst. Nubeera Beebee v. Sheikh Shoojaoodeen,	Calcutta Court of Appeal,	Sept. 13, 1817.
49		Zh. Mymunsingh	March 17, 1817.
50	Imdad Ali v. Moohummud Kazim and others,	Zillah Burdwan,	Nov. 26, 1821.
51	Koonwur Rutton Singh v. Fyzoollah and others,	Zillah Bareilly,	July 21, 1814.
52		Zh. Mymunsingh	March 31, 1817.
53	Zeydoodeen and others v. Rufeeq and others,	Zillah 24-Pergunnahs,	Dec. 10, 1819.
54	Musst. Buhloo v. Mooqeem and others,	Zillah Chittagong,	Jan. 15, 1821.
55	Manik Janha v. Shamut Ali Khan,	Patna Court of Appeal,	July 20, 1815.
56	Imam Buksh and others v. Munnoo Beebee and others,	Zillah Burdwan,	Aug. 23, 1821.
57	Syud Abdool Ali v. Syud Gholam Ahmud,	Zillah Aligurh,	May 10, 1816.
58	Nusrut oollah Khan v. Lihazoodeen and others,	Zillah Hooghly,	March 26, 1817.
59	Suda v. Fukeera and others,	Zillah Bareilly,	Sept. 21, 1818.
60	Gholam Imam and Ainoollah, v. Musst. Seeta,	Patna Court of Appeal,	May 18, 1814.
61		Zillah Burdwan,	Aug. 24, 1806.
62	Gholam Hoosein v. Musst. Zeinub Beebee,	Sudder Dewanee Adawlut,	June 8, 1801.
63	Gholam Mohioodeen and others v. Oomaid Ali and others,	Dacca Court of Appeal,	Sept. 3, 1817.
64	Qumur Ali and others v. Basir Moohummud,	Zh. Chittagong,	Feb. 17, 1819.
65	Shumsoodeen and others v. Suleemoodeen and others,	Zillah Backergunge,	Sept. 1, 1803.

No. of the Case.	*Names of the Parties.*	*Designation of the Court in which the opinion was delivered.*	*Date of the opinion.*
66		Zh. Backergunge	
67	Syud Kuleem v. Bebee Munna,	Ditto Ditto	
68	Muhabut Jung v. Musst. Rumman and Gholam Hoosein,	Zillah Bareilly,	Feb. 3, 1807.
69	Musst. Hyatee Khanum v. Koolsoom Khanum and Mirza Mehdee,	Sudder Dewanee Adawlut,	July 31, 18[illegible].
70	Shureefoonisa v. Khizuroonisa and others,	Ditto Ditto	Nov. 16, 1822.
71	Kala Khan v. Musst. Docoo Bebee,	Dacca Court of Appeal,	March 19, 1800.
72	Kuldady and others v. Lauljeemul	Zh. Moradabad	
73	Kiramut Khan and others v. Khyratee and others,	Zillah Furruckabad,	April 12, 1820.
74	Musst. Ruheemun v. Musst. Noorun and others,	City of Moorshedabad,	April 20, 1819.
75	Musst Bukhta Beebee v. Musst. Ooruz and others,	Zillah Jessore,	Aug. 26, 1819.
76	Maun Beebee v. Kuberun,	City of Patna,	Nov. 3, 1807.
77	Misree Khanum and Usmutoonisa v. Mirza Ahsunoollah and others,	Patna Court of Appeal,	June 19, 1816.
78	Musst. Ameena Beebee v. Musst. Goolbudun,	City of Dacca,	April 25, 1814.
79	Musst. Bheekun (Pauper), v. Lulloo and Dutt Ram,	Patna Court of Appeal,	March 22, 1814.
80	Oomurduraz v. Furman Bebee,	Zh. Backergunge	
81	Rumzaun Ali v. Moohummud Zuman and others,	Zillah Chittagong,	May 23, 1822.
82	Musst. Dhana v. Musst. Mulkee,	City of Benares,	June 4, 1821.
83	Kamea Beebee v. Muhtaboodeen and others,	Zillah Chittagong,	Feb. 6, 1817.
84	Jumeeloonisa v. Muhfooz Ali and others,	Zillah Aligurh,	Aug. 19, 1813.
85	Moohummud Wasiq and others v. Moohummud Ameer and others,	Zillah Backergunge,	Feb. 13, 1821.
86	Musst Nasoo v. Khadim Ali,	Zillah Behar,	July 21, 1814.
87	Sunaoollah v. Musst Phool Beebee and others,	Zillah Chittagong,	Jan. 12, 1816.
88		Bareilly Court of Appeal,	April 18, 1821.
89		Zillah Aligurh,	April 27, 1813.
90	Morad Khan v. Kureem Khan,	City of Moorshedabad,	April 17, 1809.

No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
91	Musst. Zuleikha and others v. Musst. Muhurum Beebee,	Zillah Chittagong,	Sept. 7, 1824.

SALE.

No.	Names of the Parties.	Court.	Date.
1	Musst. Fuhmeeda and others v. Baichoo Rai,	Zillah Sarun,	Jan. 16, 1821.
2	Nusrut oollah Khan v. Lihazoodeen and others,	Zillah Hooghly,	March 26, 1817.
3	Jehanoonisa v. Muleehoodeen,	Sudder Dewanee Adawlut,	May 30, 1812.
4	Mungoo and Sulba v. Prankishen,	Zh. Backergunge	
5	Musst. Munkoo v. Meer Fuizundi Ali,	City of Patna,	Dec. 12, 1820.
6	Muha Dava Gundha v. Musst. Ashoorun,	City of Dacca,	June 2, 1820.
7	Sheikh Burkut oollah v. Khoobee and others,	City of Patna,	Jan. 31, 1818.
8	Koosul Singh v. Mungla,	Zh. Furruckabad,	Feb. 3, 1817.
9	Musst. Beebun v. Fyzun and others,	Patna Court of Appeal.	July 27, 1804.
10	Musst. Zuhooroonisa and others v. Mehdi Ali Khan and others,	Patna Court of Appeal,	April 5, 1814.
11	Ruhum Ali v. Shah Shumsoodeen,	Zillah Shahabad,	April 26, 1810.
12	Musst. Khoobdowlut and others v. Musst. Hufeezoonnisa and others,	Zilh. Moradabad,	
13	Abdool Nubee v. Salikram,	Zh. Furruckabad,	March 10, 1813.
14	Moohummud Tuqee v. Musst. Sajda and others,	Zilh. Beerbhoom,	Nov. 27, 1815.
15	Sheikh Mooizoodeen v. Laul Beebee,	Zillah Hooghly,	July 31, 1823.

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No.	Names of the Parties.	Court.	Date.
1	Rai Omrao Singh v. Dewan Ajeet Singh,	Zillah Shahabad,	March 23, 1821.
2	Sheer Khan and others v. Shuhamut Ali	Zilh. Chittagong,	June 8, 1817.
3	Radhakissen Tewaree v. Digumber and Bhineck,	City of Patna,	March 18, 1820.
4	Bhuwaneepersaud v. Sheikh Kureem	Zillah Tipperah,	Jan. 9, 1816.

No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
5	Moohummud Mundar and others v. Musst. Nurum Beebee and others,	Zilh. Chittagong,	Feb. 19, 1822.
6	Shuhamut oollah v. Moohummud Sumee and others,	Dacca Court of Appeal.	Dec. 28, 1820.
7	Moohummud Zumaun v. Moohummud Hashim and others,	Zilh. Chittagong,	March 4, 1817.
8	Gosainjeechurn Doss, heir of Luch'hmun Doss v. Muhcoo and others,	City of Patna,	April 14, 1814.
9	Husnoo v. Munnoo Khan and Holas,	Zillah Shahabad,	April 9, 1812.

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No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
1		Zh. Bundlekhund!	
2	Fukhroonnisa Begum v. Meer Abdoolkureem,	Patna Court of Appeal.	Jan. 30, 1817.
3	Jhujhoo and others v. Musst. Ilahee Begum,	Zillah Bareilly,	Sept. 5, 1821.
4	Musst. Bheekun (Pauper) v. Lulloo and Dut Ram,	Patna Court of Appeal,	March 22, 1814.
5	Musst. Mooneefa and others v. Fyzoollah and others,	Patna Court of Appeal,	Jan. 18, 1819.
6	Syud Injeet v. Khaja Arratoon,	Zh. Backergunge	Sept. 16, 1820.
7	Musst. Khoobun v. Asghur Ali,	Patna Court of Appeal,	Jan. 29, 1817.
8	Sheikh Moohummud Ali v. Musst. Hubeebya and others,	Zillah Shahabad,	March 28, 1812.
9	Musst. Syudoonisa Begum & others v. Musst. Sahib Jaun and others,	Zilh. Beerbhoom	Dec. 27, 1822.
10	Gholam Nujuf Khan v. Shahamut Ali Khan,	Patna Court of Appeal,	July 20, 1815.
11	Deendar Khan v. Gholam Hoosein Khan,	Zillah Furruckabad,	Sept. 19, 1817.
12	Musst. Sugheera and others v. Gholam Nubee Khan and others,	Zilh. Beerbhoom	May 7, 1818.
13	Musst. Humeeda v. Imam Bukhsh,	Patna Court of Appeal.	Sept. 28, 1818.
14	Bukhshoo Khuleefa and others v. Baichoo,	Zillah Chittagong,	April 3, 1815.
15	Musst. Beebee Fuhmeeda v. Musst. Beebee Hufeeza,	Zillah Shahabad,	July 15, 1805.

No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
16	Soulutjung Khan and others v. Niamut oollah Khan and others,	Bareilly Court of Appeal.	May 11, 1820.
17	Tara Beebee v. Amoo Beebee,	Zillah Hooghly,	Sept. 6, 1823.
18	Kissenchund Nundee v. Musst. Luteefoonisa and others,	City of Dacca,	April 22, 1815.
19	Ahsun Ali v. Arjun and others,	Zillah Shahabad,	Aug. 31, 1810.
20	Gholam Abbas v. Coalee & others,	Zillah Bareilly,	July 21, 1821.
21	Musst. Chand Beebee and another v. Moohummud Tuqee.	Sudder Dewanee Adawlut,	Aug. 27, 1812.
22	Musst. Muntoor and others v. Musst. Pyaree and others.	Zillah Shahabad,	Dec. 7, 1820.
23	Musst. Banoo Beebee and others v. Fukhuroodeen,	Sudder Dewanee Adawlut,	April 19, 1816.

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No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
1	Khyrat Ali v. Moomtaz Ali and others,	Zillah Allahabad,	Dec. 12, 1821.
2		City of Patna,	Augt. 17, 1813.
3	Musst. Armanee Begum v. Fyzoollah and others,	Patna Court of Appeal,	March 25, 1822.
3	Moohummud Huzur v. Buhram Khan,	City of Dacca,	Sept. 21, 1809.
4	Musst. Ashoorun v. Imam Bukhsh and others,	Zillah Behar,	March 17, 1817.

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3	Sumurkund Beebee v. Imdad Khan,	Zillah Sylhet,	Feb. 8, 1822.
4	Musst. Shuhub Banoo v. Kubeer Moohummud,	Zillah Chittagong,	Feb. 24, 1821.
5	Meer Shureef Ali and others v. Moohummud Hoosein and others,	Zillah Aligurh,	May 18, 1810.
6	Deendar Khan v. the heirs of Budun Khan and Asalut,	Zillah Furruckabad,	Sept. 19, 1817.
7		Zillah Hooghly,	Aug. 27, 1819.
8		Zh. Bundlekhund	
9		Ditto ditto,	

No. of the Case.	*Names of the Parties.*	*Designation of the Court in which the opinion was delivered.*	*Date of the opinion.*
10	Shureefoonisa *v.* Khizuroonisa and others,	Sudder Dewanee Adawlut,	Nov. 16, 1822.
11	Gholam Hoosein Ali *v.* Musst. Zeinub Beebee, on account of her minor son Himmut Ali,	Ditto ditto,	June 8, 1801.
12			
13	Musst. Sahibjee Begum *v.*	Zillah Hooghly,	Jan. 25, 1822.
14	Sumerchund and others *v.* Imdad Khan,	Zillah Sylhet,	May 22, 1818.
15	Ali Moozuffer Khan *v.* Wulee Khan and others,	Patna Court of Appeal,	May 9, 1814.
16	Kubeer oodeen Ahmud *v.* Usmut Beebee,	Ditto ditto,	May 24, 1817.
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20	Musst. Kureemoonisa (Pauper,) *v.* Ruhum Ali,	Bareilly Court of Appeal,	July 31, 1812.
21	Motee Beebee *v.* Nusnee Beebee,	City of Dacca,	Jan. 25, 1813.
22	Muhabut jung Khan *v.* Musst. Jeebun and others,	Bareilly Court of Appeal,	Dec. 23, 1808.
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No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
32	Meer Nujeeboollah Khan *v.* Doordana Khatoon,	Patna Court of Appeal,	Jan. 5 1803.
33	Buhadoor Khan and Noor Beebee *v.* Kureem Bukhsh,	Zillah 24 Pergunnahs,	April 22, 1808.
34	Nubeeya Begum *v.* Moohummud Ashiq,	Zillah Buckergunge,	Aug. 25, 1809.
35	Gholam Hoosein Ali *v.* Musst. Zeinub Beebee,	Sudder Dewanee Adawlut,	June 8, 1801.
36	Moshrif Khan and others *v.* Ramnursingh Roy,	Zillah Mymunsingh,	May 21, 1817.
37	Wujeehoonisa Khanum *v.* Mirza Hoosein Ali,	Sudder Dewanee Adawlut,	Dec. 5, 1808.
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39	Musst. Chand Beebee and others *v.* Peer Moohummud,	City of Dacca,	April 25, 1815.
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No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
4	Musst. Syudoonisa Begum and others v. Musst. Sahib Jaun and others,	Zilh. Beerbhoom,	Dec. 27, 1822.
5	Khaja Aboo Moohummud Khan v. Khaja Burkutoollah Khan,	Sudder Dewanee Adawlut,	Feb. 20, 1815.
6	Azmutoollah v. Rambhudur,	Zilh. Chittagong,	Sept. 22, 1815.

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3	Deendar Khan v. Gholam Hoosein Khan,	Zillah Furruckabad.	Sept. 19, 1817.
4		Zilh. Moradabad,	July 14, 1818.
5	Musst. Munkoo v. Husun Ali and others,	Zillah Saharunpore,	July 29, 1808.
6	Musst. Soobhanee v. Musst. Shatabun,	Zillah Shahabad,	Nov. 18, 1816.
7	Mudarun Khan v. Khyratee Khan,	Bareilly Court of Appeal,	May 7, 1817.
8	Kazee Saedoodeen v. Moohummud Yoosuf and others,	Zillah Tipperah,	Nov. 18, 1815.
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No.	Names of the Parties.	Court	Date
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2	Jugunnauth Chatoorjya v. Gour Patur and others,	Ditto ditto.	June 6, 1816.
3		Zillah Agra,	June 21, 1813.
4	Musst. Hyatoonisa and Abdoollah v. Moofukhurool Islam,	Sudder Dewanee Adawlut,	June 10, 1805.
5	Hoosein Bukhsh and others v. Kheiroollah Shah,	Zillah Shahabad,	March 14, 1819
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7	Sheikh Moortuza and others v. Sheikh Moohummud Bakir and others,	Zillah Agra,	Jan. 9, 1815.

No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
8	Gholam Moortuza & others v. Sheikh Moohummud Bakir and others,	Bareilly Court of Appeal,	May 21, 1814.
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10	Sheik Buckhun v. Sheik Buhadoor,	Zilh. Beerbhoom,	May 18, 1818.

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2	Busti Khan Pauper v. Mina Beebee,	Zillah Hooghly,	March 7, 1815.
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4	Jeewun Lal v. Abadee Khan and others,	Patna Court of Appeal,	Feb. 14, 1814.
5	Kazee Uzeezoodeen v. Ali Raza and Izzutoonisa,	Zillah Bareilly,	Jan. 10, 1817.
6	Mooteeram v. Nahir and others,	Zillah Aligurh,	Sept. 28, 1806.
7	Ramsunker Rai v. Jee Beebee and others,	Zillah Backergunge,	
8	Musst. Jugun v. Mirza Yoosuf Beg,	Patna Court of Appeal,	Feb. 21, 1814.
9	Ali Ismayil Khan v. Bholanauth,	City of Patna,	Sept. 3, 1807.
10	Musst. Fatima v. Imam Bukhsh and Ruhum Bukhsh,	Patna Court of Appeal,	Feb. 4, 1814.

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4	Musst. Dibya Beebee v. Misree Beebee,	City of Dacca,	May 4, 1810.
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No. of the Case.	Names of the Parties.	Designation of the Court in which the opinion was delivered.	Date of the opinion.
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9	Nizamoodeen v. Govind Roy and others,	Zillah Seharunpore,	March 9, 1813.
10	Meer Nujeeboolah Khan v. Doordana Khatoon,	Patna Court of Appeal,	
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ERRATA.

Page 11. In the note for "lesser" read "less."

Page 22. For "four" read "five" in the 13th line.

Page 24. For "six" read "five" in the 3rd, and for "two" read "one" in the fourth line, and after the word "six" in the 17th line, read "without a fraction"

Page 33. For "Section XII." read "Section XIII."

Page 52. For "sale" in the 7th line read "gift"

Page 64. For "Eevery" in the 21st line read "Every"

Page 256. In the note for "lieu" read "lien"

Page 270. For "af" read "of" in the 2nd line.

Page 288. In the note for "wheter" read "whether."